
COMMENT

BEYOND ELECTIONS: ABOLITIONIST LESSONS FOR THE LAW OF DEMOCRACY

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The prison abolition movement, building on a long history of abolition in the United States, is articulating a vision of democracy that centers the lived experiences of people, particularly marginalized communities. Requiring more than legal standing and a secure right to vote, the abolitionist view of democracy calls for economic and civic standing, community self-determination, and equality. This view starkly contrasts with the dominant concept of democracy in the legal field most attentive to democratic concerns—the law of democracy, which defines democracy largely according to electoral rules and processes. This Comment presents an initial comparison of these two visions of democracy. When considered together, the abolitionist concept of democracy reveals the insufficiency of formalistic approaches to build a democracy that is deep, just, and experienced as legitimate by the governed. Looking to abolitionists’ concepts of state can deepen public law scholarship and inform the choices of democracy practitioners by enriching their advocacy in the electoral realm and widening their focus beyond elections.

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In 1957 when a group of us formed the Southern Christian Leadership Conference, we chose as our motto: "To save the soul of America." We were convinced that we could not limit our vision to certain rights for black people, but instead affirmed the conviction that America would never be free or saved from itself until the descendants of its slaves were loosed completely from the shackles they still wear.¹

INTRODUCTION

The defining image of the attack at the U.S. Capitol on January 6, 2021 may not be the crowds pushing past police, individuals videoing others breaking windows, or even the staff and elected officials huddled together in

¹ Martin Luther King, Jr., *Beyond Vietnam*, Riverside Church, New York, N.Y. (Apr. 4, 1967), [https://perma.cc/6B3T-ZAX8].

fear.² Rather, what may be most remembered, swaying in a galley framing the Capitol's marble tiers, is a noose.³

The year 2020 was one of “reckoning.”⁴ In response to the police killing of George Floyd, what Professor Cornel West called a “public lynching,”⁵ the

² *Scenes of Violence at U.S. Capitol Shock World*, ASSOCIATED PRESS (Jan. 6, 2021), <https://apnews.com/article/joe-biden-donald-trump-electoral-college-elections-de812995a8c7cbea5c1de56a3d1aa007> [<https://perma.cc/J4YN-KLVD>] (including a photo of “Trump supporters try[ing] to break through a police barrier”); *Rioters Break Windows and Breach U.S. Capitol*, CNN, <https://www.cnn.com/videos/politics/2021/01/06/jim-himes-inside-washington-dc-protest-congress-electoral-college-vpx.cnn> [<https://perma.cc/37NY-KMHG>]; Alex Daugherty & David Smiley, *Gas Masks, A Prayer and Guns Drawn. Inside the Riot at the U.S. Capitol Building*, MIAMI HERALD (Jan. 6, 2021, 10:22 PM), <https://www.miamiherald.com/news/politics-government/article248317480.html> [<https://perma.cc/YM3T-5ZGT>] (depicting lawmakers and aides huddled in the upper pews of the U.S. House chamber as loud bangs were heard outside the chamber); Ted Slowik, Opinion, *Column: Rep. Robin Kelley Describes Terror as Rioters Stormed Capitol. ‘We Heard a Gunshot.’*, CHICAGO TRIBUNE (Jan. 14, 2021, 5:29 PM), <https://www.chicagotribune.com/suburbs/daily-southtown/opinion/ct-sta-slowik-robin-kelly-congress-st-0114-20210114-dpcwgk7syzhonl7hr4c6tnezle-story.html> [<https://perma.cc/MM34-MMNS>] (showing a photograph of lawmakers and staff “shelter[ing] . . . as protesters try to break into the House Chamber”).

³ Rhea Mahbubani, *Nooses Spotted as Pro-Trump Rioters Spark Chaos and Lawlessness on Capitol Hill*, BUSINESS INSIDER (Jan. 6, 2021, 5:40 PM), <https://www.businessinsider.com/nooses-spotted-as-pro-trump-rioters-spark-chaos-on-capitol-2021-1> [<https://perma.cc/S6GH-86RF>]; see also Elaine Godfrey, *It Was Supposed to Be So Much Worse*, ATLANTIC (Jan. 9, 2021), <https://www.theatlantic.com/politics/archive/2021/01/trump-rioters-wanted-more-violence-worse/617614> [<https://perma.cc/WMM2-GZT7>] (detailing rioters’ calls for the murder of Vice President Mike Pence, the erection of the noose and hanging galley by the Reflecting Pool, the use of zip ties meant to restrain hostages, and the discovery of pipe bombs in the Capitol after the insurrection came to an end).

⁴ The language of “reckoning” was used widely in reporting on the events of 2020. See e.g., Jeff Faux, *A Hard Reckoning for the Democrats: Race, Class, and Joe Biden’s Election*, SALON (Dec. 6, 2020, 11:59 AM), https://www.salon.com/2020/12/06/a-hard-reckoning-for-the-democrats-race-class-and-joe-bidens-election_partner [<https://perma.cc/5LZV-F9NB>] (suggesting the November 2020 election results suggest needed changes in strategy for the Democratic party to retain its base); Lee Drutman, *Both Parties are Heading Toward a Reckoning*, FOREIGN POLICY (Nov. 4, 2020, 1:29 PM), <https://foreignpolicy.com/2020/11/04/biden-trump-win-political-realignment-party-system> [<https://perma.cc/BFF8-65JU>] (“The way the United States is doing democracy is broken.”); Fabiolo Cineas, *How Biden Has—And Hasn’t—Harnesses the National Reckoning on Race*, VOX (Aug. 19, 2020, 5:30 PM), <https://www.vox.com/2020/8/19/21372408/joe-biden-racial-justice-policy> [<https://perma.cc/AF9P-KKMD>] (“[A]lthough Biden has mastered the rhetoric [of anti-racism], critics say he needs to do much more to signal his commitment to the national reckoning on race.”); Alex Thompson, *White America is Reckoning with Racism. It Could Reshape 2020.*, POLITICO (June 9, 2020, 7:50 AM), <https://www.politico.com/news/2020/06/09/white-voters-2020-biden-304804> [<https://perma.cc/FzRJ-NCXW>] (“The killing of George Floyd by a white police officer—and the viral video of the agonizing 8 minutes and 46 seconds with the officer’s knee on Floyd’s neck—has prompted a reckoning with racism . . .”). In December 2020, even Vice President Kamala Harris noted the transition administration was facing multiple crises, including “a long-overdue reckoning on racial justice.” TIME, *TIME Person of the Year: Joe Biden and Kamala Harris*, YOUTUBE, at 1:10 (Dec. 10, 2020), <https://www.youtube.com/watch?v=F6HT-iYImf4> [<https://perma.cc/AZL4-W64M>].

⁵ Hugh Muir, Cornel West: ‘George Floyd’s Public Lynching Pulled the Cover off Who We Really Are’, GUARDIAN (Oct. 19, 2020, 1:00 AM), <https://www.theguardian.com/us-news/2020/oct/19/cornel-west-george-floyds-public-lynching-pulled-the-cover-off-who-we-really-are> [<https://perma.cc/WJY9-T933>] (“George Floyd’s public lynching connected with the pandemic, connected with the

country (and world) erupted into protests against police violence and white supremacy.⁶ By November, frivolous claims of voter fraud and lawsuits challenging the election results eroded confidence in the otherwise sound presidential election.⁷ Thus, a narrative of two crises, against the backdrop of the COVID-19 pandemic, took form: one racial and the other electoral.⁸

neo-fascist gangster in the White House, and pulled the cover off who we really are and what our system really is" (quoting Cornel West)). Indeed, Professor West expressed his gratitude for the eruption of protests in response to George Floyd's killing: "It is so clear it is a lynching at the highest level. Nobody can deny it. And I thank God that we have people in the streets. Can you imagine this kind of lynching taking place and people are indifferent? People don't care? People are callous? You have just a few people out there with signs?" Interview with Cornel West, Anderson Cooper 360⁹ (@AC360), TWITTER, at 0:01-0:20 (May 29, 2020, 8:57 PM), <https://twitter.com/AC360/status/1266534277208031233> [<https://perma.cc/C3UP-YKQ8>].

⁶ Lauren Aratani, *George Floyd Killing: Hundreds of Thousands Turn Out for Huge Protests Across US*, GUARDIAN (June 6, 2020, 6:18 PM), <https://www.theguardian.com/us-news/2020/jun/06/george-floyd-killing-memorial-service-protests> [<https://perma.cc/C5ZM-ZKK3>] (describing large protests in cities including Philadelphia, New York, and Chicago). Notably, the protests in response to George Floyd's killing expanded beyond the borders of the United States. *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [<https://perma.cc/E7M2-TVP3>] (recounting protests against anti-Black police violence in England (where protesters threw a statute of a Seventeenth Century slave trader into Bristol Harbor), Brazil, Spain, Scotland, Hong Kong, Australia, France, and numerous other countries around the world).

⁷ Various voting rights and election specialists, media outlets, and even former Attorney General William Barr disputed President Donald Trump's claims of voter fraud in the November 4, 2020 elections. See *It's Official: The Election Was Secure*, BRENNAN CTR. (Dec. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure> [<https://perma.cc/6CM2-ZKCH>] ("By all measures, the 2020 general election was one of the most secure elections in our history."); Hope Yen, Ali Swenson, & Amanda Seitz, *AP Fact Check: Trump's Claims of Vote Rigging Are All Wrong*, ASSOCIATED PRESS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5> [<https://perma.cc/6E5M-P4J2>] ("Trump's allegations of massive voting fraud have been refuted by a variety of judges, state election officials and an arm of his own administration's Homeland Security Department."). Nonetheless, the claims of voter fraud appear to have weakened voter confidence in the election, particular among Republicans, both before and after the election was held. Andrew Wagaman, *Poll: 1 in 3 Pennsylvanians "Not Confident at All" in Legitimacy of 2020 Election Results*, MORNING CALL (Jan. 29, 2021, 3:11 PM), <https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-nws-pa-pennsylvania-post-election-poll-20210129-npigbj4r5bdijicaytwo4emmha-story.html> [<https://perma.cc/TKD2-3JL2>] ("About one-third of Pennsylvanians and two-thirds of Republicans who voted in the 2020 general election do not have any confidence in the accuracy of the final results, according to a post-election poll by the Muhlenberg College Institute of Public Opinion."); Justin McCarthy, *Confidence in Accuracy of U.S. Election Matches Record Low*, GALLUP (Oct. 8, 2020), <https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx> [<https://perma.cc/KJG9-BYFK>] (reporting that "at a time when President Donald Trump has repeatedly questioned the validity of voting this year," only fifty-nine percent of voters felt "very" or "somewhat confident" in the accuracy of the upcoming election, and specifically noting that Republicans and right-leaning independents expressed less confidence in the accuracy than Democrats and Democratic leaners).

⁸ Many journalists and pundits raised the alarm about the threats to democracy. For example, one journalist wrote,

The noose erected at the capitol grounds on January 6 made indisputable the link between these two crises. As the high symbol of white supremacist violence⁹ was erected on the high symbol of American democracy,¹⁰ a question was posed: what is the relationship between race and American democracy?¹¹ The ensuing national debate about January 6 and its meaning seemed to try to distill an answer to exactly this question. Then-President Elect Joe Biden

Trump's claims and the lawsuits are not, and have never really been about, changing vote totals. By fanning the spectre of voter fraud, Republicans are laying the foundation for questioning the legitimacy of a Biden presidency and any election They are sowing doubt not just about the 2020 election, but whether America's voting system—the foundation of American democracy—is sound.

Sam Levine, 'Corrosive to Democracy': What Do Trump's Baseless Claims Really Mean?, GUARDIAN (Nov. 13, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/nov/13/trump-election-voter-fraud-claims-attack-democracy> [https://perma.cc/5SKH-TJ7B]. The Republican Governor of Massachusetts, Charlie Baker, similarly warned: "The president's comments that there's some national conspiracy around this aren't supported by any of the facts and they are damaging to democracy." Lisa Kashinsky, *Charlie Baker Blasts Trump's Election Fraud Claims as "Bad for Democracy"*, BOS. HERALD (Nov. 6, 2020, 3:16 PM), <https://www.bostonherald.com/2020/11/06/charlie-baker-blasts-trumps-election-fraud-claims-as-bad-for-democracy> [https://perma.cc/N28C-JQN3]. Meanwhile, the crisis of racism in the United States was far from displaced by electoral conflict. See, e.g., Justin Worland, *America Had a Reckoning on Race this Year. The Election Showed How Little Has Changed*, TIME (Nov. 5, 2020, 5:39 AM), <https://time.com/5907733/race-in-america-2020-election> [https://perma.cc/SE9P-D5V4] (arguing that the "small gap between the two [presidential] contenders left many despondent and fearful," and failed to bring about the change the racial justice reckoning seemed to promise—in spite of the uprising "nothing really changed," as "[w]hen it came time to vote, tens of millions of Americans evidently shrugged off the racism").

⁹ Kevin C. Peterson, *Is the Noose, a Symbol of Racial Terrorism, Returning?*, WBUR (July 17, 2017), <https://www.wbur.org/cognoscenti/2017/07/17/noose-returning-kevin-c-peterson> [https://perma.cc/C7NC-BDSS] (describing the placement of nooses in workplaces and public spaces, including the National Museum of African American History and Culture in Washington, D.C., and the significance of the symbol in light of the history of lynching in the United States); see also EQUAL JUST. INITIATIVE, *LYNCING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 3 (3d ed. 2017), <https://ej.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf> [https://perma.cc/88Z4-NQKY] ("Lynching profoundly impacted race relations in this country and shaped the geographic, political, social, and economic conditions of African Americans in ways that are still evident today."); Brandon T. Jett & Allison Robinson, *The Chilling Similarities Between the Pro-Trump Mob and Lynchings a Century Ago*, WASH. POST (Jan. 15, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/01/15/chilling-similarities-between-pro-trump-mob-lynchings-century-ago> [https://perma.cc/35HG-5VXB] (describing the "chilling" parallels between the insurrection on January 6 and lynching in the late nineteenth and early twentieth centuries).

¹⁰ Joe Biden, *Speech Condemning Capitol Protest* (Jan. 6, 2021), <https://www.rev.com/blog/transcripts/joe-biden-remarks-condemning-capitol-protest-transcript> [https://perma.cc/68UB-YSAC] (decrying the "assault" on the Capitol—"the Citadel of liberty"—as "[a]n assault on the most sacred of American undertakings, the doing of the people's business").

¹¹ This question has been posed for centuries in different forms. See, e.g., Frederick Douglass, *What to the Slave is the Fourth of July?* (July 5, 1852), reprinted in Dave Zirin, *What to the Slave is the Fourth of July?* by Frederick Douglass, NATION (July 4, 2012), <https://www.thenation.com/article/archive/what-slave-fourth-july-frederick-douglass> [https://perma.cc/9G6Q-3Y76] ("What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim.").

offered, on January 6, a repudiation of the mob as simply not the “true America” and not “who we are.”¹² Editorials rejected his statements as ahistorical for failing to grasp the long history of white supremacist violence in general and in response to electoral defeats in particular.¹³ What has emerged is a national conversation, not just about the crisis of racial injustice and the United States electoral system, but about the very nature of the country’s political system: what is the character of American democracy and how might it be transformed?¹⁴

The field of law most explicitly focused on democracy concerns—the law of democracy—is currently ill-equipped to contribute to this conversation. Law of democracy scholars agree that democracy is in crisis. With works examining hyper political polarization, low voter turnout, and voter suppression of various kinds, scholars in the field recognize that things are awry in the American political system.¹⁵ And yet, the scope of analysis in the law of democracy is

¹² The President remarked:

Let me be very clear. The scenes of chaos at the Capitol do not reflect a true America, do not represent who we are. What we’re seeing are a small number of extremists dedicated to lawlessness. This is not the dissent. It’s disorder. It’s chaos. It borders on sedition, and it must end now. I call this mob to pull back and all the work of democracy to go forward.

Biden, *supra* note 10.

¹³ See, e.g., Lindsay Crouse, Adam Westbrook, & Sanya Dosani, Opinion, *Stop Pretending ‘This is Not Who We Are’*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/opinion/capitol-riot-america.html?action=click&module=Opinion&pgtype=Homepage> [<https://perma.cc/DFR4-A764>] (“In the wake of Wednesday’s insurrection, lawmakers have embraced one response: ‘This is not who we are.’ But that’s not true at all. . . . [E]verything we saw that afternoon was exactly who we are—because it’s the product of who we’ve always been. Until we face that truth, we’ll never change it.”). Professor Franita Tolson, while not taking issue with President Biden’s message, contextualized the insurrection in the historic practice of invoking patriotism to justify white violence. Specifically, she drew attention to a parallel coup in Wilmington, North Carolina in 1898—“another time in American history in which a duly elected government was overthrown by white supremacists seeking to regain political power through any means necessary.” Franita Tolson, *Why the Mob Thought Attacking the Capitol Was Its ‘1776 Moment’*, SEATTLE TIMES (Jan. 25, 2021, 11:52 AM), <https://www.seattletimes.com/opinion/why-the-mob-thought-attacking-the-capitol-was-its-1776-moment/> [<https://perma.cc/3D4X-X2UY>].

¹⁴ See, e.g., Megan Ming Francis & Deepak Bhargava, *We Need a Racial Reckoning to Save Democracy*, NATION (Feb. 17, 2021), <https://www.thenation.com/article/society/racism-discrimination-education-democracy> [<https://perma.cc/H8VU-FEBJ>] (arguing that the crisis on display during the events of January 6 is “rooted in our country’s long history of racism” and calling for a “[r]acial reckoning through truth and reconciliation-style commissions” in addition to policy changes including immigration reform and D.C. statehood).

¹⁵ See, e.g., Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 8 (2020) (analyzing the “recent degradation of American democracy”); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 151 (2017) (defining “constitutional rot” as “a process of decay in the features of [the United States] system of government that maintain it as a healthy democratic republic”); Yasmin Dawood, *The Fragility of Constitutional Democracy*, 77 MD. L. REV. 192, 194, 196 (2017) (questioning whether “the survival of

limited to a nearly singular focus on electoral politics.¹⁶ This focus both results from and reifies a narrow vision of democracy—one defined by the holding of regular, competitive elections; that conforms to majority-rule; and that professes to follow one person, one vote. After a year like 2020, the importance of such basic democratic foundations cannot be overstated.

However, so far as state violence or social and economic inequities do not intersect with electoral structures—no matter how institutionalized such violence and inequity may be—they fall outside of the law of democracy’s frame. With such an understanding of democracy, law of democracy scholarship cannot respond to the extra-electoral concerns of police violence and white supremacy. The vision of democracy that results is what abolitionist Mariame Kaba terms a “so-called democracy”¹⁷—a democracy of electoral rules, that fails to conform to the intuitions of citizens or a commonsense notion of justice, and that cannot explain its own crisis. In this Comment, I call this “nominal democracy.”

The nominal view of democracy that predominates in the law of democracy field results, in part, from the lack of attention to the historic and current work of some of the country’s foremost democratic thinkers: abolitionists. Nineteenth century abolitionists who fought to end slavery saw enslavement as a moral *and democratic* problem.¹⁸ Before and after the formal abolition of slavery, they fought to end the “slave democracy” of the American

constitutional democracy in America [is] at serious risk”); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 83-85 (2018) (evaluating whether the structures and institutions accounted for in the U.S. Constitution prevent “democratic backsliding” or promote “democratic stability”); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 5 (2019) (examining whether “the judiciary can serve as an institutional buffer in protecting democracy against systemic failure”).

¹⁶ See Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 4-5 (2011) (discussing the narrow focus on electoral systems within the law of democracy field); see also subsection I.A.4.

¹⁷ Mariame Kaba & John Duda, *Towards the Horizon of Abolition: a Conversation with Mariame Kaba*, NEXT SYSTEM PROJECT (Nov. 9, 2017) <https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba> [<https://perma.cc/GY8M-BJDS>].

¹⁸ As Manisha Sinha writes:

Abolitionists were the intellectual and political precursors of twentieth-century anticolonial and civil rights activists, debating the nature of society and politics, the relationship between inequality and democracy, nation and empire, labor and capital, gender and citizenship. They used the vehicle of antislavery to criticize the democratic pretensions of Western societies . . . Abolitionists were original and critical thinkers on democracy, not simply romantic reformers who confined themselves to appeals of the heart.

MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 3 (2016). Dr. W.E.B. Du Bois, for example, describes nineteenth century American democracy as a “slave oligarchy” that abolitionists of the era sought to end via both the formal abolition of slavery and the reconstruction of the democratic system at its root. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880*, at 497 (Henry Louis Gates Jr. ed., Oxford University 2007) (1935).

founding and to create in its stead an “abolition-democracy,” without which true emancipation and racial equality would be impossible.¹⁹ Modern abolitionist movements—a fast-growing coalition of community groups, scholars, artists, and activists working in and outside prisons—have a similar goal.²⁰ While the modern call to abolition focuses on the legacy of slavery in the form of police and prisons, these systems, abolitionists maintain, are not only gross violations of human rights and architects of racial hierarchy, but institutions that fundamentally condemn the character of American democracy.²¹ The goal, then, is not only to bring an end to policing and prisons, but to dismantle the democratic system that built them and replace it with one that is more equal and just.²² Thus, abolitionists past and present offer answers to the question that arose after January 6, 2021:²³ the nature of American democracy is bound up in racial subordination and resistance and always has been; achieving justice requires challenging and rebuilding democracy, including but also far beyond the conduct of elections.²⁴

In this, abolitionists employ a “capacious” and substantive concept of democracy.²⁵ Abolitionists start with substance, appraising a democracy based

¹⁹ Joy James, *Introduction: Democracy and Captivity*, in *THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS* xxi, xxi (Joy James ed. 2005); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 90-92 (2005); *infra* subsection I.B.1.

²⁰ Indeed, the modern prison abolition movement began with a group of “activists, former prisoners, lawyers, and scholars” who convened for three days at the University of California, Berkeley in 1998 for the *Critical Resistance: Beyond the Prison Industrial Complex* “international conference and strategy session.” Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5-6 (2019).

²¹ DAVIS, *supra* note 19, at 92-93; Joy James, *The Mesh: Democracy and Captivity*, in *FREE AT LAST?: BLACK AMERICA IN THE TWENTY-FIRST CENTURY* 17, 17 (Juan Battle, Michael Bennett, & Anthony J. Lemelle, Jr. eds., 2006) (“Infused as they are with economic and ethnic-racial bias, the current massive incarceration and detention apparatuses constitute a crisis in contemporary American democracy.”).

²² See, e.g., Roberts, *supra* note 20, at 4-7 (describing abolitionist movements as those that are working to dismantle “systems, institutions, and practices” including the prison industrial complex); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 410 (2018) (“[The] reimagination of policing—rooted in Black history and Black intellectual traditions—transforms mainstream approaches to reform.”); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019) (describing abolitionist efforts as “re-envisioning democracy in genuinely liberatory terms”).

²³ SINHA, *supra* note 18, at 1 (“The conflict over the contours and nature of American democracy has often centered on debates over black freedom and rights. The origins of that momentous and ongoing political struggle lie in the movement to abolish slavery.”).

²⁴ *Id.* at 5 (“The abolitionist project of perfecting American, indeed global, democracy remains to be fulfilled. In that sense, its legacy is an enduring one.”).

²⁵ Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020) (describing the vision of democracy “emerging from today’s grassroots movements on the left”).

on the material experiences of all people, particularly those at the margins.²⁶ As such, an abolition democracy demands that a government invests its resources in achieving economic and social equality.²⁷ It is discontent with legal equality alone.²⁸ But abolitionists also care deeply about process. To achieve one of the key goals of an abolition democracy—community self-determination²⁹—abolitionist movements recognize the importance of fair elections and voting while acknowledging the insufficiency of electoral participation to secure community control.³⁰ Abolitionists call for greater economic and social rights and—most importantly—power.³¹ In an abolitionist democracy, people are involved in their own governing in many intimate ways, including but not limited to voting.³² This vision ultimately coheres with and builds on what Professor Cornel West and others call “deeper democracy;”³³ accordingly, in contrast to the “nominal democracy” offered by the law of democracy, I refer to the abolitionist vision as “deep democracy.”

In spite of the richness and stark differences in these two theories of democracy, they have only begun to be considered together in legal

²⁶ See McLeod, *supra* note 22, at 1619 (calling for a concept of democracy attentive to substantive rights); Hari Ziyad, *I'll Still Complain About Politics Even When I Don't Vote—Fight Me.*, BLACK YOUTH PROJECT, <http://blackyouthproject.com/ill-still-complain-politics-even-dont-vote-fight> [https://perma.cc/NAG9-MKES] (arguing for the importance of centering of marginalized communities and evaluating change based on its impact on those communities).

²⁷ See Roberts, *supra* note 20, at 43 (describing the destructive and creative duality as necessary for abolition, “because prisons will only cease to exist when social, economic, and political conditions eliminate the need for them and because installing radical democracy is crucial to preventing another white backlash and reincarnation of slavery-like institutions in response to the abolition of current ones”).

²⁸ See Akbar, *supra* note 22, at 426 (describing abolition as demanding the elevation of “the lived realities of people, and the concrete changes made therein, over changes in law itself”).

²⁹ *Id.* at 432 (describing the centrality of “Black people’s relative powerlessness to self-determine the shape of their lives and communities [as] core to anti-Black racism” and noting the inclusion of calls for greater political power and “Black self-determination” in the Black Lives Matter Movement); see also 8 TO ABOLITION 4 (2020), https://static1.squarespace.com/static/5edbf321b6026b073fef97d4/t/5ee0817c95eaa484011b8fe/1591771519433/8toAbolition_V2.pdf [https://perma.cc/6YRF-8AS4] (calling for investment to community self-governance as one of eight major policy proposals).

³⁰ McLeod, *supra* note 22, at 1623.

³¹ See, e.g., Frances Fox Piven, *Black Lives Matter. Do Elections?*, IN THESE TIMES (Jan. 21, 2019), <https://inthesetimes.com/article/21657/black-lives-matter-elections-Barbara-Ransby-freedom-fighters> [https://perma.cc/K326-A67Z]; THE MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE 3, 15 (2016), <https://archive.org/details/20160726M4blVisionBookletV3/page/n1/mode/2up> [https://perma.cc/A6FL-3AQ6] (calling for electoral reform as one of six major policy proposals, also including reparations and economic investment, to ensure “Black humanity and dignity” and build “political will and power” in the United States).

³² McLeod, *supra* note 22, at 1619 (“[C]ontemporary abolitionists hold in common a commitment to transforming criminal legal processes in connection with expanding equitable social-democratic forms of collective governance.”); THE MOVEMENT FOR BLACK LIVES, *supra* note 31, at 15 (discussing election protection and electoral expansion as methods of enhancing Black political power).

³³ CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 142 (2004).

scholarship.³⁴ This Comment contributes an initial comparison of the vision of democracy that each field advances and discusses the implications of viewing them side by side for scholarship and practice. In Part I, I discuss the law of democracy and the prison abolition movement, focusing on the way each defines democracy and citizenship, analyzes U.S. democracy and its history, and articulates a theory of change. Because a key difference between the law of democracy and abolitionist movements is the importance each field places on elections, Part I also examines how abolitionists understand voting rights and electoral advocacy. In Part II, I argue that examining nominal and deep democracy together reveals the inadequacy of nominal democracy to guide the work of creating a democracy in which communities are truly able to self-govern and greater social and economic equality is possible. In fact, nominal democracy may be dangerous in that it draws attention towards electoral issues alone and away from other pressing substantive problems such as policing and prisons, legitimizes the current system by labeling it a democracy without attention to the outcomes it produces, and marginalizes democracy advocates and scholars acting outside the realm of elections. I also discuss the implications of this analysis for scholarship in the law of democracy. Finally, in Part III, I suggest that democracy lawyers need not be stuck in the nominal democratic framework. By looking to abolitionists' analysis and concepts of democracy, lawyers can improve their traditional work to secure fairer elections and the right to vote while also looking beyond elections to support efforts to build deep democracy in movements and at local and city levels.

I. TWO DEMOCRACIES: CONCEPTS OF STATE IN ABOLITION AND THE LAW OF DEMOCRACY

The law of democracy and abolitionists are advancing two highly distinct concepts of democracy. This section examines the key features of each field: the definitions the fields give to “democracy” and “citizenship,” the way each approaches the history of American democracy, the problems and solutions the fields diagnose and prescribe, and, finally, each field’s theory of change.

A. *The Law of Democracy*

Many disciplines lay claim to expertise in democracy, including political science and philosophy, with which law shares porous boundaries. This

³⁴ Akbar, *supra* note 25, at 95-96 (critiquing a law of democracy account of 2020 for its highly technical concept of democracy and focus on electoral reform).

Comment focuses specifically the law of democracy—the leading legal field in which questions of democracy are contemplated³⁵—and abolition.

1. Introducing the Law of Democracy

Before the 1990s, when the law of democracy “came into its own,” little scholarship focused on democracy and what did operated squarely within the realm of constitutional law and focused on individual rights.³⁶ Only a small number of scholars focused on the topic of law and democratic politics.³⁷ This scholarship primarily sought to vindicate the dignity of individuals and “ensur[e] the equal treatment of particularly vulnerable groups” through the elaboration of broad and general principles of democracy, including “participation, deliberation, political equality, and liberty” and their associated rights.³⁸ In this approach, the individual was the central political actor.³⁹

The 1990s saw an unprecedented wave of democratization around the world and an increase in legal controversies about democracy in the United States.⁴⁰ The law of democracy field started to take form when, in response, a group of “dynamic young scholars” challenged the dominant approaches to democracy scholarship in two primary ways.⁴¹ First, they insisted that democracy required attention to institutions, including but not limited to legislatures and courts, and the way those institutions structure power—not simply individual rights.⁴²

³⁵ See Abu El-Haj, *supra* note 16, at 4 n.10 (noting that the effort to build the law of democracy into its own field “has been a resounding success”); cf. Chad Flanders, *Election Law: Too Big to Fail*, 56 ST. LOUIS U. L.J. 775, 775 (2012) (“[E]lection law is now a huge growth field. . . . There is no shortage of election articles in journals . . . [,] no shortage of cases to be litigated, and no shortage of casebooks with which to study them. There is just a lot of *stuff* going on in election law.”).

³⁶ Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 7 (2010) (noting that in early scholarship in the law of democracy, “[c]onstitutional law dominated our collective imagination”); Samuel Issacharoff & Richard H. Pildes, *Not by Election Law Alone*, 32 LOY. L.A. L. REV. 1173, 1173 (1999) (asserting that “issues of the law of democratic governance” had been treated as falling within the general domain of constitutional law, informed by “conventional frameworks of individual rights, compelling state interests, First Amendment freedoms, and the ubiquitous debate over the legitimacy of judicial review”).

³⁷ See Gerken, *supra* note 36, at 7, 7 n.2 (highlighting Professor Dan Lowenstein, in particular, as writing “systematically” about election law prior to 1990).

³⁸ Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 806-807 (2014) (citing primarily the work of Ronald Dworkin).

³⁹ *Id.* at 807.

⁴⁰ See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 29 (2004) (“This is the Age of Democracy.”).

⁴¹ Gerken, *supra* note 36, at 7.

⁴² See Pildes, *supra* note 38, at 807 (“Instead of this rights-based orientation, I want to encourage more focus on how political power gets mobilized, gets organized, and functions (or breaks down).”); see also SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 1 (4th ed. 2012) (explaining that “a democratic political system is largely defined by the relative liberty of citizens . . . [and] is always and inevitably itself a product of institutional forms and legal structures”).

Early scholarship in the law of democracy declared the field to be concerned with the *structure* of U.S. political systems and the laws that undergird that structure.⁴³ Laws and institutions became the focus of analysis—not rights alone and sometimes not rights at all.⁴⁴ This marked a significant departure from the focus on individual rights of constitutional law at the time.

Second, early law of democracy scholars argued that the dominant canons of constitutional law—for example, equal protection and the First Amendment—were a poor fit for this new focus.⁴⁵ As Professor Richard H. Pildes explains: “Understandings of rights or equality worked out in other domains of constitutional law often badly fit the sphere of democratic politics The kinds of harms that constitutional law recognizes, the tools of doctrinal analysis, and the remedial options ought to be viewed distinctly in the domain of democratic institutions.”⁴⁶ What was needed, scholars argued, particularly for deciding the appropriateness of judicial review and intervention in democracy litigation, was a new approach unique to the “Wild West” of democratic politics.⁴⁷ In 1999, at the first symposium dedicated to election law—used synonymously with the “law of democracy”⁴⁸—the field was officially declared its own field of study.⁴⁹ Several years later, in what Professor Heather Gerken declares a “bloodless revolution,” it formally broke off from constitutional law.⁵⁰

⁴³ See, e.g., Issacharoff & Pildes, *supra* note 36, at 1173 (1999) (“Only recently has direct attention been paid to the distinct ways in which rights and political structures, as well as courts and legislatures, come together in the complex legal construction of the institutions and laws governing the political process.”)

⁴⁴ See Pildes, *supra* note 38, at 806 (describing the law of democracy as having an “institutionalist and realist” lens with a focus on the “organization, structure, and exercise of actual political power in elections and in governance”); cf. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1101 (2005) (reviewing RICHARD H. HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003)) (comparing many early law of democracy scholars’ singular focus on structure with Professor Richard Hasen’s suggested reorientation toward individual rights).

⁴⁵ Pildes, *supra* note 40, at 39 (arguing that constitutional law “lacks a general structure that would properly organize the emerging ‘law of politics’”).

⁴⁶ *Id.* at 40.

⁴⁷ Gerken, *supra* note 36, at 7; see also Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996) (describing voting rights cases as a “new, and particularly tangled, patch of the political thicket” requiring an approach distinct from other areas, particularly in so far as voting rights requires the recognition of *group* rights).

⁴⁸ Consistent with existing legal scholarship, I use the terms “law of democracy” and “election law” interchangeably in this Comment, while recognizing and contending that the law of democracy should not be constrained to a singular focus on elections.

⁴⁹ Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999); Gerken, *supra* note 36, at 7; see Richard L. Hasen, Introduction, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOYOLA L.A.L. REV. 1095, 1095 (1999) (“[N]o one can seriously question whether election law is a subject in its own right, related to but apart from its very different parents, constitutional law and political science . . .”).

⁵⁰ Gerken, *supra* note 36, at 7-8 (“Our formal Declaration of Independence was Rick Pildes’s 2004 Harvard Foreword.”).

Since the early 2000s, as democracy-focused litigation increased,⁵¹ so did the field's body of scholarship and prominence. Unlike when the first law of democracy casebook was published in 1998 and noted a paucity of attention to democracy in legal education,⁵² law of democracy is now a common part of legal education and has shaped legal discourse and practice.⁵³ The field has consistently grown in its analysis since its inception,⁵⁴ which has unsurprisingly led to many debates about its scope and approach. Scholars have challenged the boundaries between the law of democracy and constitutional law, with prominent scholars such as Professor Gerken inhabiting both fields and advocating for more election law theorists to tackle constitutional law topics.⁵⁵ Arguably the largest debate within the field has been about the extent to which the law of democracy should remain only focused on institutions and structure versus individual rights, with scholars advocating one or the other or a mixture of both.⁵⁶

Perhaps the field's biggest impact has been making visible and giving focus to the role visions of democracy play in constitutional and other law.

⁵¹ See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 70 (2009) (outlining large growth in election litigation cases).

⁵² ISSACHAROFF, KARLAN & PILDES, *supra* note 42, at xiv (“[G]iven the longstanding centrality of democratic politics to all aspects of public law[,] it is something of a mystery that law schools have not typically taught courses in the law of democracy. Conceptions of democratic politics provide the backdrop for many courses, but that is where they remain.”).

⁵³ Courses focusing on election law and the right to vote are now offered in most law schools. *E.g.*, *Election Litigation and Civil Procedure*, HARV. L. SCH., <https://hls.harvard.edu/academics/curriculum/catalog/index.html?o=66387> [<https://perma.cc/5TGL-XSEJ>]; *Law of Democracy*, STAN. L. SCH., <https://law.stanford.edu/courses/law-of-democracy> [<https://perma.cc/9Q33-PAXR>]; *Law of Democracy*, TUL. UNIV. L. SCH., <https://law.tulane.edu/courses/law-democracy> [<https://perma.cc/96RQ-7QDQ>]; *Law and Politics*, NYU LAW, <https://www.law.nyu.edu/areasofstudy/legal-theory-history-social-sciences/law-politics> [<https://perma.cc/2H7H-B4E7>]. Harvard Law School now operates an Election Law clinic. Kelsey J. Griffin, *Harvard Law School Announces Two New Clinics*, HARV. CRIMSON (Mar. 2, 2020), <https://www.thecrimson.com/article/2020/3/2/hls-new-clinics> [<https://perma.cc/FEG8-FMHX>]. William & Mary Law School has run an Election Law Program since 2005. *Election Law Program*, WM. & MARY L. SCH., <https://law.wm.edu/academics/intellectuallife/researchcenters/electionlaw> [<https://perma.cc/2QT9-688K>]. Additionally, at least three casebooks have been published in the field. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (5th ed. 2016); DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL TOKAJI, *ELECTION LAW: CASES AND MATERIALS* (6th ed. 2017); MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, *VOTING RIGHTS AND ELECTION LAW* (2010).

⁵⁴ See Flanders, *supra* note 35, at 775-76, (arguing that the field's scope is too large to teach effectively in one semester and providing suggestions for which subjects within election law professors should prioritize); *cf.* ISSACHAROFF, KARLAN & PILDES, *supra* note 42, at vii (“Casebooks, like most of us, tend to get fatter as they age.”)

⁵⁵ Gerken, *supra* note 36, at 9 (calling for election law scholars to “colonize” constitutional law, rather than function wholly independently).

⁵⁶ See, *e.g.*, Charles, *supra* note 44, at 1101-02 (comparing “the individualists,” and “the structuralists,” but ultimately arguing that “election law cases cannot be divided into neat categories along the individual rights and structuralism divide”).

Recognizing that “democracy” had lurked behind many of the most important jurisprudence and constitutional doctrine of the twentieth century, Professor Pildes and Professor Samuel Issacharoff wrote in 1999 that “[w]hat makes [the] field exciting, and what links it back to constitutional law and forward to new arenas of democratic participation, is taking *democracy itself* out of the background and placing it squarely at the center of our inquiries.”⁵⁷

2. Defining Democracy and Citizenship

Even with “democracy” intentionally at the center of its focus, the law of democracy field does not at least explicitly espouse one concept of democracy. Instead, the field relies on a base definition of democracy characterized by some combination of competitive elections and civil liberties. Professor Pildes’s reasoning in his field-defining Supreme Court Foreword to the 2003 term in the *Harvard Law Review* is illustrative. In the Foreword, he presents two political theories of democracy: “minimalist” and “participatory.”⁵⁸ According to Professor Pildes, the minimalist view holds that democracy is “little more than selection of rulers by competitive elections.”⁵⁹ He describes the participatory model as considerably more substantive, with mass civic participation and “liberal commitments to individual liberty and nondiscrimination” built into “the very idea of democracy.”⁶⁰ Professor Pildes is of the mind, however, that neither he nor the law of democracy field need espouse either view. Instead, he skirts the issue, concluding that “[d]emocratic politics should have substantial leeway to experiment with the design of democratic institutions and to endorse different priorities, at different times, among these aims.”⁶¹ In the end, he adopts for himself—and the field in general—what he considers to be the common thread in all visions of democracy: “[T]hat those who exercise power be regularly accountable through elections to those they represent.”⁶²

The first casebook written in the field—*The Law of Democracy*, written by Professors Issacharoff, Pamela S. Karlan, and Pildes—adds a gloss of rights to Pildes’ basic criteria: “[A] democratic political system is largely defined by

⁵⁷ Issacharoff & Pildes, *supra* note 36, at 1174, 1174 n.5 (emphasis added) (noting that one study has located “democracy as the central idea driving Warren Court jurisprudence”) (citing MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 74-111 (1998)).

⁵⁸ Pildes, *supra* note 40, at 43.

⁵⁹ *Id.*

⁶⁰ Professor Pildes associates this model with Professor Benjamin Barber and Ronald Dworkin. *Id.*

⁶¹ *Id.*

⁶² *Id.* Professor Klarman, in his recent Foreword, adopted a view in line with Professor Pildes’s: “In general, democracy means that a majority of voters enjoys at least a majority of the political power.” Klarman, *supra* note 15, at 47; *see also* Akbar, *supra* note 25, at 95 (noting the narrowness of Professor Klarman’s definition of democracy).

the relative liberty of citizens to criticize existing distributions of political power and institutional arrangements.”⁶³ Professor Issacharoff similarly combines elections and civil liberties in the definition of democracy at work in his scholarship, though he also questions relying on such a “thin definition of democracy” without examination of the “rules, institutions, and definitions of eligible citizenship that serve as preconditions to the exercise of any meaningful popular choice.”⁶⁴

This definitional quandary may be attributable to the Constitution itself. The *Law of Democracy* casebook finds little help defining democracy by looking to the U.S. Constitution: “With respect to democratic politics, then, the American Constitution is a curious amalgam of textual silences, astute insights into the risks and temptations of political power, archaic assumptions that subsequent developments quickly undermined, and a small number of . . . more recent amendments that reflect more modern conceptions of politics.”⁶⁵ In general, it appears that Pildes’ eschewal of an explicit vision for democracy and embrace of a baseline criteria of elections has carried the day. The field similarly does not explicitly endorse one particular definition of citizenship, but implicit in much of the field’s scholarship is a similar, not-explicitly-minimalist, minimalist definition of citizenship: the right to vote and participate.⁶⁶

3. American Democracy and History According to the Law of Democracy

Leading scholars in the law of democracy tend to describe “American democracy” in similar structural and legal terms: its defining characteristics are that it is constitutional, non-parliamentary, and non-proportional.⁶⁷ Scholars tend to examine political structures from a global viewpoint and often

⁶³ ISSACHAROFF, KARLAN & PILDES, *supra* note 42, at 1. This Comment looks to this early casebook for analysis frequently, in part because casebooks are a particularly potent means of explicit and implicit teaching about the field’s vision of democracy. See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1065-66 (arguing that casebooks can powerfully affect a law student’s perception of a legal field, legal questions, reality, and gender).

⁶⁴ Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1411 (2007) (“[A]ll definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule.”).

⁶⁵ ISSACHAROFF, KARLAN & PILDES, *supra* note 42, at 9-10.

⁶⁶ The *Law of Democracy* casebook tends to conflate suffrage—formal or functional—with “full citizenship.” *Id.* at 97 (referring to the striking of “various federal protections of black voting rights,” the book notes that “[t]he Supreme Court also played a pivotal role in invalidating national efforts to insure full citizenship to black citizens.” (emphasis added)); see also Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1333 (2011) (describing the fundamental links between the right to vote and citizenship).

⁶⁷ Issacharoff, *supra* note 64, at 1419.

also point to unique characteristics of the U.S. political system.⁶⁸ They have noted that the United States is exceptional in its number of elected officials,⁶⁹ the lack of independent electoral oversight body or courts,⁷⁰ and the country's willingness to disenfranchise large numbers of voters for past criminal convictions.⁷¹ Professor Issacharoff also argues that the United States is unique in that its non-proportional, presidential system has insulated it from anti-democratic forces and the system has maintained a high level of stability.⁷² Here, stability is defined as the holding of regular elections: "[T]he United States has held regularly scheduled elections during wartime, even during the Civil War. The short of it is that the United States has been a remarkably stable political system since Reconstruction."⁷³ Professor Pildes also refers to the United States democracy most simply as a "mature democrac[y]."⁷⁴

It is worth briefly considering key trends that emerge when law of democracy scholars engage with the history of American democracy.⁷⁵ First, ideas of democracy at the founding loom large in the field's scholarship: founding figure notions of democracy are frequently cited for their insights to American democratic design and nature.⁷⁶ Second, law of democracy scholarship tends to suggest that the history of American democracy could be defined by a steady progression of expanding rights, from Jim Crow to the Civil Rights Movement—what Professor Chad Flanders calls the "sad and heroic" story of election law: "[T]he slow . . . march to inclusion and equal rights for all groups."⁷⁷ Discussion of the expansion of suffrage focuses on

⁶⁸ See, e.g., *id.* at 1406 (looking to court decisions setting the parameters of political participation in Germany, India, Israel, Turkey, Ukraine, and the United States); Pildes, *supra* note 38, at 810 (examining the uniqueness of features of American democracy in a global context).

⁶⁹ Pildes, *supra* note 38, at 810.

⁷⁰ *Id.* ("Furthermore, we lack independent institutions to oversee the election process, such as specialized electoral courts, independent boundary-drawing commissions, and independent agencies—institutions common in most democratic countries.").

⁷¹ ISSACHAROFF, KARLAN & PILDES, *supra* note 42, at 33 ("The United States is an outlier with regard to its felon disenfranchisement practices.").

⁷² Issacharoff, *supra* note 64, at 1421.

⁷³ *Id.*

⁷⁴ Pildes, *supra* note 40, at 37.

⁷⁵ A full historiography of the law of democracy is outside the scope of this Comment. Rather, this Comment attempts to highlight several common trends that are by no means exhaustive, but that particularly contrast with the vision of democracy that abolitionists advance.

⁷⁶ See e.g., ISSACHAROFF, KARLAN & PILDES, *supra* note 42, at 8 (grounding the book's discussion of the history of democracy in the "pre-modern vision of democratic politics," and noting that "the original Constitution reflected a particularly elite conception of democratic politics"); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312 (2006) (contextualizing an analysis of the role of political parties in American democracy with a discussion of Alexander Hamilton and James Madison's views on checks and balances); Edward B. Foley, *The History and Future of Election Law: Improving Democracy Through Knowing its Evolution*, 77 OHIO STATE L.J. 683, 684 (2016) ("Let me open our conversation today with an anecdote about James Madison.").

⁷⁷ Flanders, *supra* note 35, at 778.

racial minorities⁷⁸ but also includes the poor.⁷⁹ Some authors begin this story with Reconstruction,⁸⁰ followed by the rapid efforts of southern states to restrict access to the ballot after the Civil War through the enactment of poll taxes, literacy tests, and other procedural barriers in the voter registration process,⁸¹ though the accompanying violence of that period is often omitted.⁸² Finally, according to law of democracy scholars, the rights-expansion story climaxes in a major Civil Rights Movement achievement: the Voting Rights Act of 1965.⁸³ Professor Pildes describes the act as “[c]ompleting American [d]emocracy.”⁸⁴

4. Challenges and Theory of Change

In the last two decades, law of democracy scholars have identified a number of dire challenges to the American system, including the difficulties of the national government to act even in areas with broad popular

⁷⁸ Throughout this Comment, I borrow from Professor Maggie Blackhawk’s use of the term “minorities” as a shorthand for “politically powerless groups” who “rarely wield political power because of their entrenched minority status.” This should not obscure, however, the role of those historically in power in the subordination, marginalization, and racialization of these groups, nor the combined numerical majority of such communities in the aggregate. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1797 n.32 (2019) (citing Patricia J. Williams and her “reluctant” use of the term “minorities”); see also Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987) (noting that she uses “minority” for lack of a better word, but that the term is not accurate and implies legitimacy within the system).

⁷⁹ Pildes, *supra* note 38, at 819 (noting that poor whites in the South were also frequently disenfranchised by Jim Crow voter suppression tactics, and that they only began the process of becoming “full political participants” during the 1960s, when African Americans did).

⁸⁰ See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 YALE L. J. 1286, 1305 (2012) (discussing the effect of enfranchisement on Black civil rights during Reconstruction); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1350 (2003) (“The [Fifteenth] Amendment resulted in a huge upsurge of voting as nearly a million freedman were enfranchised.”).

⁸¹ See, e.g., Karlan, *supra* note 80, at 1350 (noting the role of state constitutional conventions in disenfranchising Black men after Reconstruction); Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 405 (1985) (discussing literacy tests—“one of the most widespread tools of discrimination”—in the context of twentieth century challenges to obstacles to voting that came before the Supreme Court).

⁸² Cf. Karlan, *supra* note 80, at 1350 (describing the disenfranchisement of Black men after the Civil War as achieved through state constitutional conventions, without mention of lynching or violence); Jordan, *supra* note 81, at 393-394, 405 (streamlining mention of “vigilante terrorism and intimidation” in a discussion of the history of the Fifteenth Amendment).

⁸³ See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 290 (2011) (“The 1965 VRA, and related changes in the era in constitutional doctrine and law, began . . . what might be considered the ‘purification’ or ‘maturation’ of the American political system.”).

⁸⁴ *Id.* at 290. But see Pildes, *supra* note 40, at 87 (noting the continuing structural features of Southern politics that made it difficult for Black people to gain office and influence policymaking even following the Voting Rights Act).

consensus,⁸⁵ the erosion of democratic norms and values,⁸⁶ the state of campaign finance regulation,⁸⁷ dysfunction in political parties,⁸⁸ vote dilution and voter suppression,⁸⁹ the disenfranchisement of people with past criminal convictions,⁹⁰ voter disinterest in elections,⁹¹ and extreme political polarization.⁹² Doubt lingers about the ability of constitutional democracy to survive what is seen by some as a global democratic recession.⁹³

Professor Pildes concludes that “American democracy over the last generation has had one defining attribute: the rise of extreme partisan

⁸⁵ Pildes, *supra* note 38, at 808 (pointing to the United States’ government’s failure to act despite “broad consensual agreement that government *must* act” as an example of “serious dysfunction”).

⁸⁶ Dawood, *supra* note 15, at 194, 196 (arguing that “[c]onstitutional democracy will avoid a crisis only if the ongoing practices of democracy reaffirm its central values” such as “representation, fairness, equality, and accountability”).

⁸⁷ See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 94-99 (1995) (explaining that more robust regulation of campaign finance is required if the United States government is to uphold its dedication to its “Madisonian goals.”); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) (critiquing the Supreme Court’s determination that “money is speech” as a misconception of the First Amendment).

⁸⁸ Levinson & Pildes, *supra* note 76, at 2329 (“Whether it is party unification or party division of government that is cause for the most concern, any understanding of the American system of separation of powers should start from the recognition that it encompasses both.”).

⁸⁹ See, e.g., Franita Tolson, *Increasing the Quantity and the Quality of the African American Vote: Lessons for 2008 and Beyond*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 313, 336-37, 337 n.111 (2008) (examining methods of political activism that can increase voter turnout among African American communities, who experience vote dilution and voter suppression at greater rates).

⁹⁰ See, e.g., Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1149 (2004) (arguing that felon disenfranchisement should be considered punitive rather than regulatory especially in light of the “outcome-determinative effects of criminal disenfranchisement”); Karlan, *supra* note 80, at 1346 (“Today, the largest—and growing—group of American citizens who remain disenfranchised are people convicted of crimes.”); Alex C. Ewald, *“Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 (2002) (explaining the “durability and the incoherence” of criminal disenfranchisement while suggesting that “the modern commitments of both liberalism and republicanism should lead Americans to abandon [criminal disenfranchisement]”); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 731 (1998) (asserting that felon disenfranchisement laws are maintained by the Supreme Court’s “color-blind jurisprudence” and “burden[] minority groups from achieving effective access to the ballot box”).

⁹¹ See, e.g., Pildes, *supra* note 40, at 37 (“[A]s the idea and practice of democracy are spreading world-wide, the long-established democracies are experiencing disaffection, distrust, and disillusionment with the institutions of democracy.”).

⁹² See Dawood, *supra* note 15, at 198 (“America is a nation divided, each with its own set of facts (or alternative facts) and its own sense of the truth.”). Notably, while some law of democracy theorists have described polarization as a destabilizing threat to the Republic, Professor Pildes argues intense partisan alignment in the wake of the Voting Rights Act may instead be a feature of “mature” American democracy. Pildes, *supra* note 83, at 287-88.

⁹³ See, e.g., Huq & Ginsburg, *supra* note 15, at 82 (suggesting that recent moves toward authoritarianism suggests a concern about a “recession” of democracy around the world); Dawood, *supra* note 15, at 194 (“[W]e have witnessed democratic backsliding via constitutional and legal means, which leave a facade of democratic institutions while hollowing out democracy’s substance.”).

polarization.”⁹⁴ Without an ideological center, he argues, no coalition can achieve the supermajorities it needs to govern in the American political system.⁹⁵ Professor Dawood echoes the survival anxiety: “Constitutional democracy will avoid a crisis only if the ongoing practices of democracy reaffirm its central values” of “representation, fairness, equality, and accountability.”⁹⁶ In sum, the constitutional democracy of the United States is on the brink of demise or, at least, may be slowly rotting.⁹⁷

In response to these challenges, law of democracy scholars have recommended a range of solutions. These make up a theory of change that is predominantly electoral—focusing, for example, on the design of elections—as well as legal—advocating specific strategies for litigation or judicial review. Theorists often look to the rise of fascism in Europe and other authoritarian regimes for guidance about how to avoid a similar fate in the United States.⁹⁸ The conditions that enabled Hitler’s rise to power are strong cautionary examples of the subversion of democratic processes for illiberal goals.⁹⁹ Accordingly, some scholars argue for public financing of elections and for those funds to go directly to parties who are better able to check the majoritarian and illiberal impulses of the masses.¹⁰⁰ To address polarization, scholars recommend several reforms, the most prominent and feasible of which is holding open primary elections, thereby allowing the broadest public to weigh in and prevent the rise of autocratic candidates.¹⁰¹

Still, scholars have also noted that efforts reliant on expanding access to elections are limited by Supreme Court precedents that frustrate attempts to combat voter suppression. In particular, the Court’s decision in *Shelby County v. Holder* has spawned scholarship focusing on the Court’s reading of the

⁹⁴ Pildes, *supra* note 83, at 275.

⁹⁵ *Id.* at 330–31.

⁹⁶ Dawood, *supra* note 15, at 194, 196.

⁹⁷ Balkin, *supra* note 15, at 151 (defining “constitutional rot” as “a process of decay in the features of [the American] system of government that maintain it as a healthy democratic republic.”).

⁹⁸ See, e.g., Klarman, *supra* note 15, at 8, 11–19 (discussing common tactics among authoritarian figures in India, Russia, Hungary, and others); Issacharoff, *supra* note 64, at 1408–1410 (looking to the Weimer Republic to ground a hypothetical wherein antidemocratic parties seek control through democratic means and describing steps that democracies can take to prevent “being compromised from within”). For a similar approach in the field of political science and evaluation of recent developments in U.S. democracy in light of global precedents, see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 5–6 (2018).

⁹⁹ Issacharoff, *supra* note 64, at 1408 (noting that Hitler’s rise to power “occurred within the confines of Weimar democratic processes”).

¹⁰⁰ See Pildes, *supra* note 38, at 825 (proposing a system of public financing with an emphasis on political parties rather than individual candidates, given that “individual donors are more ideologically extreme and more polarized than non-donors”).

¹⁰¹ See *id.* at 821 (noting that there is “little systemic empirical evidence” indicating that open primaries would reduce partisan polarization, but optimistically still concluding that “opening up primary elections to a broader electorate than just party members” could make a difference).

Fifteenth and other Reconstruction Amendments and how those interpretations inhibit democracy reform efforts.¹⁰² Other scholars point to the urgency of restoring the right to vote of formerly incarcerated, or in some cases, currently incarcerated people, to mitigate or reduce the democratic decline.¹⁰³

Ultimately, like the problems the field has diagnosed, a majority of the solutions it proffers are legal and electoral. This limitation in analysis and theory of change may be self-imposed. Professor Pildes notes, “[i]f we could identify the specific features of the way politics has come to be organized that account for extreme polarization, we could, in principle, change those features and restore a center to American politics.”¹⁰⁴ However, “[i]f the causes of hyperpolarized democracy are deep, structural transformations in American politics and life, there is little reason to expect the nature and dynamics of our politics to change. Nor could we do anything about it, even if we wanted to.”¹⁰⁵

Looking to the example of disenfranchisement of people with felony convictions may prove a helpful case study in understanding the law of democracy’s mode of analysis and theory of change. In the last decades, particularly since the 2000 election of George W. Bush, scholarly interest in felony disenfranchisement has grown enormously within the field.¹⁰⁶ There is a consensus among law of democracy scholars that this type of disenfranchisement disproportionately affects people of color generally and Black men in particular.¹⁰⁷

¹⁰² See generally *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (finding unconstitutional the provision of the Voting Rights Act that would subject certain jurisdictions seeking to regulate voting to preclearance requirements). For a critique of the Court’s pre-*Shelby County* failure to intervene on behalf of African American voters, thus allowing for the dilution of their votes, see Tolson, *supra* note 89, at 314.

¹⁰³ See Karlan, *supra* note 90, at 1149, 1165 (describing the disenfranchisement of currently and formerly incarcerated people and proposing a different approach to criminal disenfranchisement that prevents the “dilute[ion of] the voting strength” of communities of color).

¹⁰⁴ Pildes, *supra* note 83, at 275.

¹⁰⁵ *Id.* It is worth noting that several scholars have broken with the electoral and legal model of solutions and suggested that politics and political leadership, more than institutions, will be key to resolution of some of the issues scholars have highlighted in past years. See Dawood, *supra* note 15, at 196 (“Ultimately, though, much will turn on developments in the political arena. . . . the structural deficiencies of the Constitution will be rendered more or less problematic by the political environment.”); Huq & Ginsburg, *supra* note 15, at 78 (“The near-term prospects of constitutional liberal democracy hence depend less on our institutions than on the qualities of political leadership popular resistance, and the quiddities of partisan coalitional politics.”).

¹⁰⁶ See Karlan, *supra* note 90, at 1157 (discussing the effects that felon disenfranchisement had on the voting population in Florida during the 2000 election cycle, including one study estimating that Al Gore would have won Florida with more than 31,000 votes if not for criminal disenfranchisement).

¹⁰⁷ See *id.* (“In fact, more black men are disqualified today by the operation of criminal disenfranchisement laws than were actually enfranchised by the passage of the Fifteenth Amendment in 1870.”).

Professor Karlan provides helpful illustrative analysis of the law of democracy's unique blend of rights and structure, as well as an example of how scholars view the means of challenging such systems. In an article that helped to build on literature in this arena and spur more creative scholarship, Professor Karlan noted that not only does disenfranchisement of people with felony convictions violate the rights of Black men, but it also dilutes the political power of communities when their members are removed from those communities and incarcerated.¹⁰⁸ To address this problem, Professor Karlan recommends deploying a legal argument based on the Eighth Amendment: felony disenfranchisement violates the Constitution's prohibition on cruel and unusual punishment.¹⁰⁹

Both Professor Karlan's analysis and solution are typical of the law of democracy. Her critique combines both individual rights-based frameworks and the structural analysis that is unique to the field. Her solution—namely, constitutional litigation—is also representative. For problems like felony disenfranchisement, law of democracy scholars have advanced many *legal* theories for why courts should invalidate state laws restricting the franchise, including arguments based on the First and Fifteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the Voting Rights Act.¹¹⁰

While Professor Karlan's argument highlights the power dynamics at stake, her ultimate recommendations—novel litigation strategies—remain within the legal frame of the law of democracy. When crafting solutions to the problem of felon disenfranchisement, the electoral, legal lens of the law of democracy operates as a constraint. Here, the broader problem of criminalization and incarceration is somewhat subordinate to the restriction of the voting rights of people convicted of felonies.¹¹¹ The solution does not contemplate organizing, power building, or greater community control over legislation including criminal codes or state constitutional provisions, in short, decarceration. Rather, the proposed litigation challenges the operation of the electoral rules governing the extant system. Professor Karlan's strategy provides a helpful arrow in the quiver to end felony disenfranchisement, but

¹⁰⁸ *Id.* at 1149, 1157-58.

¹⁰⁹ *Id.* at 1165-69.

¹¹⁰ See, e.g., Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 115-16 (2013) (advancing a theory of "First Amendment Equal Protection" to reveal how the justifications for felon disenfranchisement laws may be unconstitutionally discriminatory); Jordan, *supra* note 81, at 390 ("[T]he conceptual failure of the United States Supreme Court and commentators to fulfill the promise of fair and effective representation is due to a persistent refusal to embrace fully the independent rights afforded by the [F]ifteenth [A]mendment.").

¹¹¹ Professor Karlan does note the "sheer magnitude" of the exclusion wrought by felony disenfranchisement and mentions mass incarceration, but does not linger on the underlying system of incarceration and its potential democratic effects outside of electoral and political power. Karlan, *supra* note 90, at 1149, 1156-57.

the strategy may be complemented by other, more expansive possibilities, for which we next turn to abolition.

B. *The Democracy of Abolitionists*

Modern abolitionist movements are composed of diverse coalitions of artists, activists, scholars, filmmakers, and more. While their primary aim is to bring about an end to police and prison systems, they also understand those systems to be inextricable from the political system that produced them. As such, abolitionists offer rich critiques of what they term the “carceral democracy” of the United States and a vision for change in response: “abolition democracy.” The vision of abolition democracy is evolving, but generally calls for greater social and economic rights, in addition to political rights, as well as greater equality and self-governance for all communities, particularly racialized minorities.

1. Introducing Today’s Abolitionists

In order to understand an abolitionist concept of democracy, it is first crucial to introduce modern abolition movements. Abolition is as old as the United States.¹¹² Abolitionists of the eighteenth and nineteenth centuries agitated to bring an end to the transnational slave trade and the institution of slavery.¹¹³ After slavery’s formal demise, post-war abolitionists fought to eradicate “Slave Power,” a term they coined to refer “not only to Southern whites who owned slaves but to constitutional provisions and political practices that gave them disproportionate power in the federal government.”¹¹⁴ Since the 1960s, new social movements have picked up and carried the abolitionist torch forward, seeking both continuity with the abolitionism of the past and a radical future free of “Slave Power” in its modern forms.¹¹⁵

¹¹² See SINHA, *supra* note 18, at 9 (using the story of an unnamed African woman who in 1721 organized an armed rebellion on the English slave ship *Robert*, to explain that abolition began “with those who resisted slavery at its inception”); NO NEW JAILS, CLOSE RIKERS NOW: WE KEEP US SAFE 51 (Version 2), https://drive.google.com/file/d/1NPW9cNv6AsbKYF_se4d8IIHQ5cyHOvOx/view [https://perma.cc/HY42-TBXZ] (“[Abolition] is rooted in the centuries old fight by enslaved Africans to end slavery.”).

¹¹³ See Roberts, *supra* note 20, at 54 (describing how the “nineteenth-century movement to abolish slavery prominently included engaging with the U.S. Constitution”); SINHA, *supra* note 18, at 3 (“Abolition was a radical, democratic movement that questioned the enslavement of labor.”).

¹¹⁴ Roberts, *supra* note 20, at 60.

¹¹⁵ See *id.* at 48 (highlighting the comparison between prison abolitionists of the 1990s and anti-slavery activists of the antebellum and Reconstruction periods); Rachel Kushner, *Is Prison Necessary?* Ruth Wilson Gilmore *Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019) <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [https://perma.cc/8J3A-DMDZ] (“By the late 1960s and early 1970s, an abolition movement had gained traction among a diverse range of people, including scholars, policymakers (even centrist ones), legislators and religious leaders in the United States.”); Roberts, *supra* note 20, at 48 (“[P]rison

Though new abolitionist aims span multiple areas, the largest movement centers on the abolition of prisons.¹¹⁶ Analyzing the exponential growth of the U.S. prison system since the 1960s,¹¹⁷ abolitionists argue that police and prisons are not neutral systems built simply to ensure public safety and

abolitionists today see continuities between the chattel slavery system and the prison system, as well as between the historic and current abolition movements.”).

¹¹⁶ See Roberts, *supra* note 20, at 7 (focusing on the “movement to abolish the prison industrial complex” while noting that “movements that refer to themselves as abolitionist are working to dismantle a wide range of systems, institutions, and practices beyond criminal punishment”). Other abolition movements focus on Immigration and Customs Enforcement, U.S. military occupation, rent, debt, the war on terror, and foster care and the child welfare system—what abolitionists term “family policing.” See Akbar, *supra* note 25, at 90–91 (“We are living in a time of grassroots demands to transform our built environment and our relationship with one another and the earth. To abolish prisons and police, rent, debt, borders, and billionaires.”); “*Abolition is the Only Answer: A Conversation with Dorothy Roberts*, RISE (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts> [<https://perma.cc/F75M-YUSH>] (describing the modern call for the abolition of child welfare and the reasons “family policing” is a better description of “how brutal and destructive” the system’s “practice and policies are”); DOROTHY ROBERTS, SHATTERED BONDS x (2001) (concluding that the only solution to remedy the highly racialized harms of foster care and child removal policies was to abolish the systems entirely); *The Abolish ICE Movement*, BRENNAN CENTER (July 30, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained> [<https://perma.cc/45CC-W3GG>] (describing the rise of the “abolish ICE” movement from hashtag to “more formal stance”); ABOLISHING THE WAR ON TERROR: BUILDING COMMUNITIES OF CARE (2021), <https://static1.squarespace.com/static/5daae451959d419aa03a0ed/t/60380009dddf0701b42b6b8fe/1614282764135/Abolish+WOT+Policy+A+agenda.pdf> [<https://perma.cc/2AR6-H395>] (outlining a “policy agenda” crafted by an international coalition of grassroots organization “on abolishing the War on Terror and building communities of care”); RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH (2020), http://therednation.org/wp-content/uploads/2020/04/Red-Deal_Part-I_End-The-Occupation-1.pdf [<https://perma.cc/Z29T-TFYG>] (calling for the abolition of child welfare systems and to end U.S. military occupation, among other demands); see also Nik Heynen, *Toward an Abolition Ecology*, ABOLITION J. (Dec. 29, 2016), <https://abolitionjournal.org/toward-an-abolition-ecology> [<https://perma.cc/RB9D-6TPM>] (“How can abolitionist ideals inform contemporary political ecological struggles around air quality, soil quality, water pollution, inadequate shelter, food insecurity, and hunger that continue to ravage communities of color and poor communities?”).

¹¹⁷ The movement has responded to and protested the growth of the U.S. carceral system since the 1970s, when approximately 200,000 people were incarcerated, to today, when approximately 1.4 million people are held in state and federal prisons. *Trends in U.S. Corrections*, SENTENCING PROJECT (Aug. 2020), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/UTF3-ZYVU>]. In 2016, Black people were incarcerated in state prisons at 5.1 times the rate that white people were incarcerated. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> [<https://perma.cc/FSR4-35US>]. The movement also identifies and protests the role of police, who disproportionately surveil, beat, and kill Black Americans, in this system. See Akbar, *supra* note 22, at 460–62 (“Given their historical and contemporary entanglements with anti-Black racism, police cannot be reformed or fixed. The state must be transformed . . . the police must be eliminated . . . [P]olicing and mass incarceration co-constitute each other.”); *id.* at 419 (describing U.S. Department of Justice reports that “document the targeting of African Americans by police as a systematic practice that overrode constitutional restraints on police power . . . [and] are punctuated by stories of police violence and discretion”).

prevent crime.¹¹⁸ Rather, in reading the origins of police and prisons back to slavery and settler colonialism, abolitionists maintain that the institutions disproportionately target, cage, and kill Black, Indigenous, and communities of color and perpetuate a racialized hierarchy of privilege, resources, and citizenship within the United States.¹¹⁹ In this analysis, it is not *bad* police or *too much* prison that causes these wrongs, but rather the very existence of police and prisons in their American form.¹²⁰ The result of this analysis is that abolition—not reform—is required.¹²¹

To understand an abolitionist vision of democracy, it is critical to dispel a common misunderstanding about abolitionists. Both past and present

¹¹⁸ Akbar, *supra* note 22, at 453, 459, 460 (describing police as “the primary means of governing Black people”).

¹¹⁹ As Professor Roberts explains,

First, today’s carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems.

Roberts, *supra* note 20, at 7–8; see Akbar, *supra* note 22, at 460–62 (“The abolitionist ethic permeates the [Vision for Black Lives], which calls for an ‘end’ to various punitive and exploitative practices.”); see also *Rustbelt Abolition Radio Talks with Nick Estes, Who Talks About The History of Incarceration and Its Relation to Native Genocide and Colonization*, IT’S GOING DOWN (July 16, 2018), <https://itsgoingdown.org/rustbelt-abolition-radio-native-resistance-carceal-state> [<https://perma.cc/MZ9Z-E9V6>] (describing historic criminalization of indigenous peoples in the nineteenth and twentieth centuries during the reservation and termination eras through laws criminalizing the consumption of alcohol and police targeting of Native people outside of reservations in urban areas).

¹²⁰ See, e.g., Roberts, *supra* note 20, at 42–43 (arguing that reforms only serve to strengthen and legitimize the criminal punishment system); cf. ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 9, 73 (2019) (concluding that the criminal legal system’s “unfairness and ineffectiveness has reached such a tipping point that some kind of change must happen in order for the system to preserve its own legitimacy” and that as a result, “mass incarceration bureaucrats are looking to become the face of what they call ‘criminal justice reform.’”). Incarcerated political activist Mumia Abu-Jamal explains abolition as “a natural response to a situation that has become untenable.” Mumia Abu-Jamal, *Mumia Abu-Jamal On: Lessons from the First Abolition Movement*, WORKERS WORLD (Dec. 4, 2020), <https://www.workers.org/2020/12/52909> [<https://perma.cc/FHF6-34L6>].

¹²¹ As such, the abolitionist approach diverges sharply from a reformist agenda calling for better police oversight, enhanced accountability for police brutality, and a reduction of prison populations, among other changes. For example, while reformists might focus on curbing police brutality, abolitionists recognize that all policing takes place through the violence of community surveillance and bodily intrusion and thus, violence cannot be curbed while police exist. Roberts, *supra* note 20, at 42–43. Similarly, reformists have advocated for the provision of body cameras to police officers as an accountability tool, while abolitionists note that reforms of this type actually increase the budgets of police departments. Instead, they call for no more investment—“not one dollar more”—to police and prison systems. Akbar, *supra* note 22, at 460, 467 (“Given their historical and contemporary entanglements with anti-Black racism, police cannot be reformed or fixed.”).

abolitionists are not only concentrated on *dismantling* oppressive systems.¹²² Instead, abolition movements are deeply *creative*, focused on broad social and political analysis and the construction of positive institutions.¹²³ By asking how resources are allocated,¹²⁴ questioning the underlying evidence supporting those allocations,¹²⁵ and imagining how resources might be otherwise distributed,¹²⁶ today's prisons abolitionists make visible the policy choices inherent in the growth of police and prisons. What emerges is the use of police and prisons to meet "social insecurity"¹²⁷ and "address human needs and social problems with punitive measures"—in short, to govern.¹²⁸ What's more, these systems "deny African Americans full citizenship by disenfranchising large numbers of black individuals" and "damaging black communities' social networks."¹²⁹ Thus, abolitionists maintain that policing and caging are not only punitive responses, but political choices with anti-democratic effects.¹³⁰ Thus, the aim of abolitionist movements is not only to shutter the doors of the country's prisons and police departments, but to re-envision the democracy that built them.

¹²² As provided above, *see supra* note 119, Professor Roberts describes three tenets of abolition as: (1) centering discussions about prisons in the history of slavery in the United States; (2) recognizing the reinforcing nature of punishment and racial capitalism; and (3) imagining a democracy without cages. Roberts, *supra* note 20, at 7; *see also* Akbar, *supra* note 22, at 408 ("The movement is focused on shifting power into Black and other marginalized communities; shrinking the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transforming the relationship among state, market, and society.").

¹²³ Roberts, *supra* note 20, at 6.

¹²⁴ Abolitionist organizations across the United States are working to draw attention to city budgets and the allocation of funds to police and prisons. In New York, where a large coalition is calling for the close of the prison located on Rikers Island and "No New Jails," in-depth publications have demystified the New York City budget and process. *See, e.g.*, ABOLITIONIST RECOMMENDATIONS TO DEFUND NYPD WITH NO NEW JAILS + BY CLOSING RIKERS NOW (2021), <https://drive.google.com/file/d/198Yh4hrPY78j-q6bV2nHMAGoD6axHDt6/view> [<https://perma.cc/46V4-8P57>].

¹²⁵ There is an utter lack of evidence suggesting that police and prisons improve public safety. KARAKATSANIS, *supra* note 120, at 9, 17-20. Additionally, Mariame Kaba makes the important point: "Increasing rates of incarceration have a minimal impact on crime rates. Moreover, crime and harm are not synonymous. All that is criminalized isn't harmful, and all harm isn't necessarily criminalized. For example, wage theft by employers isn't generally criminalized, but it is definitely harmful." Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, MEDIUM (Oct. 29, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/L95C-ZPUM>].

¹²⁶ As discussed *infra*, *see* subsection I.B.4, divestment is a large part of abolitionist strategy.

¹²⁷ Loïc Wacquant, *The Punitive Regulation of Poverty in the Neoliberal Age*, 89 CRIM. JUSTICE MATTERS 38, 38 (2012).

¹²⁸ Roberts, *supra* note 20, at 44.

¹²⁹ Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1598 (2017).

¹³⁰ Roberts, *supra* note 20, at 6; *see generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 10-12, 33 (2007) (describing how "governing through crime has distorted American institutional priorities").

2. Abolitionist Definitions of Democracy and Citizenship

Given abolitionists' broad sweeping social and political analysis, it is no surprise that the movement is articulating and working towards its own view of democracy, what some call "abolition-democracy."¹³¹ The term's origin stems from W.E.B. Du Bois's 1935 landmark text, *Black Reconstruction in America*.¹³² In it, Du Bois names the government that formed immediately after the end of the Civil War—a Congress notable for its large number of Black representatives—the "abolition-democracy."¹³³ Angela Davis, who is responsible for the term's twenty-first century resurgence, understands Du Bois and his use of the term to refer to the society required to "achieve the *comprehensive* abolition of slavery."¹³⁴ This, she explains, required abolition not only in the "negative" sense—the destruction of the institutions of slavery—but also the building of "new institutions . . . to incorporate Black people into the social order."¹³⁵ Full abolition could be only accomplished through the democratization of economic means, educational institutions, and "voting and other political rights," which only the abolition democracy could provide.¹³⁶

Imagining the contours of an abolitionist democracy is an ongoing project.¹³⁷ Professor Allegra McLeod recently described abolition democracy as a project of "re-envisioning democracy in genuinely liberatory terms."¹³⁸ For McLeod, abolition democracy requires an insistence on different, more substantive criteria for democracy with positive rights such as housing and employment.¹³⁹ Professor Joel Olson calls for the revival of "abolition-democracy" to seek the end of racial privilege in the U.S. political system, without which true democracy is impossible.¹⁴⁰ Perhaps most generally, an abolitionist democracy fundamentally implies a society and government in which there are no police, prisons, or death penalty. For Professor Dorothy Roberts, a leading abolitionist scholar, the abolition democracy is required to prevent "another white backlash" or the resurgence of slavery-perpetuating

¹³¹ DU BOIS, *supra* note 18, at 197.

¹³² *Id.* at 196-97.

¹³³ *Id.*

¹³⁴ DAVIS, *supra* note 19, at 95.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ McLeod, *supra* note 22, at 1637 ("Ultimately, for abolitionists, the question of what democracy and justice might look like without prisons and police remains open, but these are attempts to begin to prefigure more meaningful forms of redress and a more liberatory democracy politics.").

¹³⁸ *Id.* at 1615.

¹³⁹ *Id.* at 1619 (noting that the criteria for democracy should include "substantive as well as formal rights, the right to be free of violence, the right to employment, housing, healthcare, and quality education.").

¹⁴⁰ JOEL OLSON, *THE ABOLITION OF WHITE DEMOCRACY* 126-27, 137-42 (2004).

institutions after prison abolition has successfully eradicated systems of punishment.¹⁴¹ Some abolitionists speak to a more amorphous democratic imagining, calling for “deeper politics”¹⁴² or “true” or “real”¹⁴³ democracy.

At work in all these approaches is a prioritizing of the ability of Black communities to exercise power and determine the shape of their lives. The Vision for Black Lives, a vision and policy statement drafted collaboratively with more than fifty abolitionist groups, calls for a system in which “Black people and all marginalized people can effectively exercise full political power.”¹⁴⁴ The Black Lives Matter (BLM) movement “demand[s] a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us—from our schools to our local budgets, economies, police departments, and our land.”¹⁴⁵ This coheres with Professor Cornel West’s reading of democracy, animated by the Black radical tradition and Toni Morrison’s writings, which views “taking back power over one’s life” as a “profoundly democratic action.”¹⁴⁶

Outside of the discussion of the contours of the abolition democracy, abolitionists spend little time haggling with an abstract definition of “democracy.” Many outright reject the labeling of the U.S. government as a democracy. “I don’t really see the U.S. as a democracy,” Kaba has observed, “I see it as something that is a so-called democracy.”¹⁴⁷ No New Jails, an abolitionist organization in New York City, echoes this sentiment: “We accept that we do not live in a democracy.”¹⁴⁸ Konstantin Kilibarda, an abolitionist scholar, describes the U.S. government as an apartheid system reinforced by mass disenfranchisement of potential political actors, including thirteen million permanent residents, eleven million undocumented people living in the United

¹⁴¹ Roberts, *supra* note 20, at 43 (“This duality is essential to abolition both because prisons will only cease to exist when social, economic, and political conditions eliminate the need for them and because installing radical democracy is crucial to preventing another white backlash and reincarnation of slavery-like institutions in response to the abolition of current ones.”).

¹⁴² KARAKATSANIS, *supra* note 120, at 96.

¹⁴³ *A Free, Flourishing Democracy*, DREAM DEFS., <https://dreamdefenders.org/freedom-papers/a-free-flourishing-democracy> [<https://perma.cc/63EM-LSTQ>] (“In a *true* democracy—one where our trust and respect is earned—our vote represents a powerful champion for better lives for all of us.”); *see also* DUBOIS, *supra* note 18, at 494 (“[T]o have given each one of the million Negro free families a forty-acre freehold would have made a basis of *real democracy* in the United States that might easily have transformed the modern world.” (emphasis added)).

¹⁴⁴ THE MOVEMENT FOR BLACK LIVES, *supra* note 31.

¹⁴⁵ *Id.*

¹⁴⁶ WEST, *supra* note 33, at 94.

¹⁴⁷ Kaba & Duda, *supra* note 17.

¹⁴⁸ NO NEW JAILS, *supra* note 112, at 2.

States, more than six million currently or formerly incarcerated people, and four million residents in U.S. territories, among others.¹⁴⁹

Other abolitionists appear to accept the basic characterization of a government as a “democracy,” but qualify the type of democracy based on the conditions the government creates and the type of justice it prioritizes. W.E.B. Du Bois may have started this practice, describing the U.S. government before emancipation as a “slave oligarchy,”¹⁵⁰ the government after the Civil War as the abolition-democracy,¹⁵¹ and the retaking of government after Reconstruction as a “dictatorship of property.”¹⁵² Professor Joy James, among others, has followed Du Bois’s example, referring to the American system first as a “slave democracy” and later as a “penal democracy.”¹⁵³ This practice reflects a general insistence that the character of a democracy be measured by the lived experiences of the governed.

Whether accepting or rejecting the overall label of “democracy,” abolitionists contest that any modern “democracy” has achieved more than a farcical approximation of inclusion or equality.¹⁵⁴ Abolitionists generally refuse to entertain narratives about overall sound-but-imperfect democracies in which contradictions between values and policy outcomes are explained as flaws. Instead, abolitionists look for coherence, asking how the democracy is in fact operating as intended and examining for whom the system *is*

¹⁴⁹ Konstantin Kilibarda, *America’s Electoral Apartheid: 30–40 Million US Residents Excluded from Voting*, ABOLITION J. (Nov. 14, 2016) <https://abolitionjournal.org/america-electoral-apartheid> [<https://perma.cc/UYU7-XPV5>].

¹⁵⁰ DU BOIS, *supra* note 18, at 497.

¹⁵¹ *Id.* at 151.

¹⁵² *Id.* at 479.

¹⁵³ James, *supra* note 19. Joy James has also elaborated:

I never considered U.S. democracy to be trustworthy. Though preferable to a dictatorship, it often seems to function as a racist-classist-misogynist-transphobic Ponzi scheme for elite accumulations and unregulated warfare and war profiteering. After centuries of genocide and racial enslavement, the U.S. denies those most in need and deserving of reparations, restitution, respect and sovereign autonomy. Insulted with exhortations to ‘try harder’ to prove our worth, chastised for going ‘too left’ for social justice, we are called upon to ‘save’ democracy from old-school authoritarianism and repression.

Joy James, *Black Revolutionary Love Reimagines Democracy*, ABOLITION J. (Feb. 21, 2021), <https://abolitionjournal.org/black-revolutionary-love-reimagines-democracy> [<https://perma.cc/D959-2JC7>].

¹⁵⁴ Professor McLeod, for example, explains that:

[A]bolitionists recognize current democracies, and particularly that of the United States, as a farce, characterized by hollow pretensions of inclusion in the face of a collective failure to reckon honestly with histories of slavery, genocide of indigenous peoples, lynching, segregation, exploitation of the working poor, gendered violence, and the persistent inequalities those practices have wrought.

McLeod, *supra* note 22, at 1618.

accountable and producing good outcomes.¹⁵⁵ In this sense, abolitionists see U.S. democracy as inseparable from its history and read that history as coherent, not in tension, with American democratic values.¹⁵⁶ Professor Eddie S. Glaude, for example, argues that the gap in the valuation of white and Black lives is “baked into one of the foundational principles of this country.”¹⁵⁷ “Most Americans see inequality—and the racial habits that give it life—as aberrations, ways we fail to live up to the idea of America,” Professor Glaude writes, “[b]ut we’re wrong. Inequality and racial habits are part of the American Idea.”¹⁵⁸ Professor Nick Estes, citizen of the Lower Brule Sioux Tribe, similarly writes: “There are core principles of American identity that revolve around white supremacy, land ownership, xenophobia, anti-Indigeness, and anti-Blackness. Those principles are ingrained not just in the Constitution, but into the broader social fabric of the United States.”¹⁵⁹

Ultimately, abolitionists are advancing a deeply contextualized, anti-abstract approach to understanding democracy—one that judges a system based on the experience of those at the farthest margins, or the “margins of the margins.”¹⁶⁰ Professor Amna Akbar offers a helpful and powerful articulation of democracy in response to the events and discourse of 2020:

Democracy is a practice. It is about contestation and self-determination. Its terrain includes labor, housing, and healthcare. Its shape is constituted by prisons and police, fines and fees, local budgets, tax dollars, and infrastructure projects. It is about the environment and our relationship to all forms of life. It is about the ideas and structures we must deconstruct, and those we build.¹⁶¹

The abolitionist view of democracy has strong implications for the concept of citizenship. In fact, one of the leading national abolitionist

¹⁵⁵ See, e.g., Akbar, *supra* note 22, at 441 (“[T]his stark idea that the system is working as it is supposed to, including racial inequality, police brutality and, mass incarceration, is regularly articulated in poor communities and communities of color. But it is almost invisible in law scholarship.” (footnote omitted)); *About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about> [<https://perma.cc/P23Y-GHCZ>] (“[W]e understand that the prison industrial complex is not a broken system to be fixed. The system, rather, works precisely as it is designed to—to contain, control, and kill those people representing the greatest threats to state power.”); Kaba & Duda, *supra* note 17 (“[T]he prison industrial complex [] isn’t broken. The system of mass criminalization we have isn’t the result of failure. . . . I understand that white supremacy is maintained and reproduced through the criminal punishment apparatus.”).

¹⁵⁶ See, e.g., JOEL OLSON, *THE ABOLITION OF WHITE DEMOCRACY* 127 (2004) (“White democracy has not violated American ideals of equality, liberty, and citizenship so much as it has shaped them.”).

¹⁵⁷ EDDIE S. GLAUDE, JR., *DEMOCRACY IN BLACK: HOW RACE STILL ENSLAVES THE AMERICAN SOUL* 9 (2016).

¹⁵⁸ *Id.*

¹⁵⁹ Nick Estes, *Water is Life: Nick Estes on Indigenous Technologies*, LOGIC MAG. (Dec. 7, 2019), <https://logicmag.io/nature/water-is-life-nick-estes-on-indigenous-technologies> [<https://perma.cc/Z47Z-SWFF>].

¹⁶⁰ Ziyad, *supra* note 26.

¹⁶¹ Akbar, *supra* note 25, at 117.

organizations, the Black Youth Project 100 (BYP100), was founded in part because organizers wanted to convene Black youth to discuss the experience of incomplete citizenship and alienation.¹⁶² Abolitionists and Black radical scholars maintain that citizenship cannot be guaranteed only through the provision of legal standing and rights, and instead must involve the substantive conditions that enable meaningful participation in the polity.¹⁶³

This multifaceted view of citizenship thus requires not only legal but also civic and economic enfranchisement.¹⁶⁴ Dr. W.E.B. Du Bois, in particular, placed enormous import on economic solvency.¹⁶⁵ Still, civic enfranchisement is also important to understanding the work that abolitionists are doing as advancing not only a more just and less incarcerated country, but deeper democracy with a fuller experience of citizenship. Professor Salamishah Tillet describes civic standing as the “right to recognition,”¹⁶⁶ explaining that where Black Americans have been granted the right to vote and formal legal equality, they have been denied civic recognition: “[T]hey have been marginalized or underrepresented in the civic myths, monuments, narratives, icons, creeds, and images of the past that constitute, reproduce, and promote an American national identity.”¹⁶⁷ This “civic estrangement” and erasure, in addition to formal legal barriers, create a hollowing of citizenship and a type of disenfranchisement.¹⁶⁸ Tillet’s call for the “democratization of memory,” or the construction of a more democratic memory,¹⁶⁹ can thus be seen as

¹⁶² See Salamishah Tillet, *Black Women in Chicago, Getting Things Done*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/opinion/sunday/black-women-chicago.html> [<https://perma.cc/W6LK-ZS9D>] (explaining how BYP100 formed after researchers hosted a conference, bringing together young Black people who felt “alienated by traditional political institutions” and “believed they were not full citizens”).

¹⁶³ See McLeod, *supra* note 22, at 1615 (“Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.”).

¹⁶⁴ See SALAMISHAH TILLET, *SITES OF SLAVERY: CITIZENSHIP AND RACIAL DEMOCRACY IN THE POST-CIVIL RIGHTS IMAGINATION* 8-9 (2012) (describing how “post-civil rights African Americans . . . emerged as legal but not necessarily civil citizens,” instead remaining “subject to the continual repression of their economic and material contributions”).

¹⁶⁵ Dr. Du Bois noted that in the wake of the Civil War, even after the passage of the Fifteenth Amendment, the only means to safeguard abolition and the vote was through ensuring newly freed people in the South economic independence. DU BOIS, *supra* note 18, at 512 (“[W]ithout land and without vocation, the Negro voter could not gain that economic independence which would protect his vote.”).

¹⁶⁶ TILLET, *supra* note 164, at 140.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.*

¹⁶⁹ Professor Tillet explains the democratization of memory as a process that allows for Black people to gain full access to civic citizenship through a formal re-remembrance of history, challenging the “polite’ national amnesia around slavery” and “reimagin[ing] democracy.” *Id.* at 136-37. This, she argues, allows for a fuller recognition of “African Americans in the civic myth and culture of the nation.” *Id.* at 138. She gives, as an example of projects that achieve this goal, lawsuits for reparations: “In addition to their pursuit of memory-justice, these suits make claims on the law and use the performance of democracy in order to safeguard future black citizens from the harms of

fulfilling the abolitionist goal to construct institutions necessary to ensure the equality and liberty of all people.

3. The History of American Democracy According to Abolitionists

A full abolitionist retelling of the history of American democracy is beyond the scope of this Comment. However, several common threads of abolitionist history telling are helpful to note, particularly in contrast with the law of democracy. First, in discussing the founding of the United States, abolitionists rarely focus on the ideas of traditional founding figures.¹⁷⁰ Rather, abolitionists are far more interested in the economic and social behavior of those founders and the systems they created and benefited from; slavery and settler colonialism, therefore, are at the fore of the abolitionist lens.¹⁷¹ Abolitionists understand slavery and colonialism—key features of the early American system—not as contradictions to the country’s democracy, but as inextricable from and constitutive of that democracy.¹⁷²

Second, abolitionists do not understand the history of American democracy as a slow progression towards justice and inclusion, but rather as a series of gains and backlash throughout which racial oppression has been constant. The gains of the Reconstruction Congress are perhaps an exception to this, as abolitionists credit them with changing, however briefly, the character of the country’s democracy.¹⁷³ However, from Reconstruction and

an inherited economic and civic injustice.” *Id.* at 137, 143. Suits for reparations, and specifically the suits that Tillet discusses, seek to “resolve the post-civil rights African American paradox of legal citizenship and civic estrangement by replacing their marginalization from the historical record with an official remembrance of the lives and contributions of enslaved African Americans.” *Id.* at 146. She concludes: “As these reparations lawsuits institutionalize and therefore democratize the national memory through juridical performances, their rhetoric of legal redress, and their formal demands for historical revision . . . serve as models of mnemonic restitution.” *Id.* at 151.

¹⁷⁰ Perhaps future scholarship will seek to redefine what it is to be a “founding” figure. *See* Danielle Allen, *A Forgotten Black Founding Father*, ATLANTIC (Feb. 10, 2021), <https://www.theatlantic.com/magazine/archive/2021/03/prince-hall-forgotten-founder/617791> [<https://perma.cc/S8gZ-VZ5A>] (urging the inclusion of Prince Hall, a Black activist, abolitionist, and “contemporary of John Adams” and “the first American to publicly use the language of the Declaration of Independence for a political purpose other than justifying war against Britain” in contemporary civics education).

¹⁷¹ *See* Roberts, *supra* note 20, at 51-52 (“The constitutional government of the United States was founded on the colonization of Native tribes and the enslavement of Africans. . . . The framers made the exclusion of Africans and Native tribes from the democracy they established foundational to the Constitution.”).

¹⁷² *Id.*; *see also* OLSON, *supra* note 140 at 51 (asserting that Alexis de Tocqueville observed that “while equality is an inevitable trend in the United States, racial equality is incompatible with its democracy [T]he United States is democratic and white supremacist simultaneously, and [] there is no necessary contradiction between the two”).

¹⁷³ *See* Roberts, *supra* note 20, at 62-63 (noting the transformative changes emerging from the gains of the Reconstruction Congress); *see also* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xx (2019) (noting that the

Redemption to present, abolitionists note the continuity of institutions that oppress people of color, particularly Black people. Pointing to convict leasing, Jim Crow, the War on Drugs, and mass incarceration, abolitionists recognize the expansion of suffrage under the Fifteenth Amendment and Civil Rights Act, but also the limitations of those legal provisions to produce change.¹⁷⁴

Third, and perhaps most important, abolitionists do not confine the history of American democracy to elections. Rather, the story of American democracy includes economic analysis—beginning with slavery and continuing with a lens of racial capitalism—and encompasses all forms of interaction with the state.¹⁷⁵

For example, in examining the fall of Reconstruction, abolitionists note the era's legal restrictions at the state level on Black people's ability to vote, but also the economic and social conditions that made such legal disenfranchisement possible. During the period "ironically known as Redemption,"¹⁷⁶ lynching and widespread state-sanctioned violence were key elements of Black citizens' relationships with the state.¹⁷⁷ It was this overwhelming rise in lynching, a lack of economic reparations to formerly enslaved people, *and* state laws that caused Black disenfranchisement—not legal changes alone.¹⁷⁸ Similarly, abolitionist history telling links the gains of the Civil Rights Movement to the subsequent criminalization of social movements and to the onset of mass incarceration that quickly followed.¹⁷⁹ Finally, in the second half of the twentieth century, abolitionists portray

Reconstruction Amendments "forged a new constitutional relationship between individual Americans and the national state and were crucial in creating the world's first biracial democracy").

¹⁷⁴ See, e.g., James, *supra* note 19, at xxxiv-xxxv (asserting that penal democracy grows in part due to legislation that diminishes free, democratic spaces, and stating that "the state continues to provide the midwifery to rebirth disenfranchisement despite the civil, human rights, and liberation movements of the twentieth century"); OLSON, *supra* note 140, at 79 ("How, in a polity in which whiteness and democracy have been inextricably connected, can greater participation be achieved without inviting a lynch mob?").

¹⁷⁵ See, e.g., Roberts, *supra* note 20, at 10 ("[A]bolition theorists view the current prison industrial complex as originating in, though distinct from, racialized chattel slavery and the racial capitalist regime that relied on and sustained it, and their movement as completing the 'unfinished liberation' sought by slavery abolitionists in the past." (footnote omitted)).

¹⁷⁶ Henry Louis Gates, Jr., *The 'Lost Cause' That Built Jim Crow*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/08/opinion/sunday/jim-crow-laws.html> [<https://perma.cc/TY93-E9WK>]. For a fuller history of the "Redemption" era, see HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 35-38 (2019).

¹⁷⁷ See Roberts, *supra* note 20, at 24 ("Racialized terror that bridged slave patrols, lynchings, and police whippings remained a feature of policing in the post-Civil Rights Era criminal punishment system.").

¹⁷⁸ GATES, JR., *supra* note 176, at 37-38.

¹⁷⁹ James, *supra* note 19, at xxxii-xxxiii (describing the "law and order" that "fed the contemporary imprisonment crisis" as arising in response to progressive social movements).

policing and prisons as having played as constitutive a role in the experience of citizenship as Jim Crow did in the first half of the century.¹⁸⁰

In sum, in keeping with a more comprehensive and substantive vision of democracy, the abolitionist history of American democracy is broader and more expansive than the history of elections and political rights alone. Moreover, by expanding histories of democracy beyond electoral participation to include violence, economic inequality, and criminalization, abolitionists capture and draw attention to the ever-shifting modes of racial oppression that often accompany or follow formal legal gains.¹⁸¹

4. Abolition Democracy: Problems and a Theory of Change

Applying an abolitionist lens to American democracy produces a damning set of critiques, but also generates imaginative solutions. Fundamentally, abolitionists see the most pernicious and interconnected elements of American “penal” democracy as: state violence exercised through surveillance, police, and prisons; racial capitalism; and racial hierarchies of power and privilege.¹⁸² Thus, in order to achieve a different, better democracy, these problems must be eradicated.

Abolitionists are also careful about the methodologies they adopt and endorse to bring about these changes. Namely, abolitionists are critical of “inclusion” as a theory of change, favoring instead power building and wielding.¹⁸³ They are critical of rights-based advocacy that centers lawyers and courts,¹⁸⁴ and instead are invested in decentralizing power and authority

¹⁸⁰ As Professor Roberts explains,

[D]uring the slavery and Jim Crow eras, state agents meted out punishment to black people without regard to their guilt or innocence. Criminalizing black people entailed both defining crimes so as to make black people’s harmless, everyday activities legally punishable and punishing black people regardless of their culpability for crimes. Thus, for more than a century, vague vagrancy and antiloitering ordinances have given police officers license to arrest black people for standing in public streets—with no attention to whether or not their presence caused any harm to anyone. The purpose of carceral punishment was to maintain a racial capitalist order rather than to redress social harms—not to give black people what they deserved, but to keep them in their place. Today, the state still aims to control populations rather than judge individual guilt or innocence, to ‘manage social inequalities’ rather than remedy them.

Roberts, *supra* note 20, at 33-34 (footnotes omitted).

¹⁸¹ *Supra* note 164 and accompanying text.

¹⁸² See *supra* subsection I.B.1. and accompanying text (explaining the racial oppression inherent in American democracy).

¹⁸³ See, e.g., OLSON, *supra* note 140, at 77-78 (“Theories of democratic participation rarely confront the problem of racial standing. In a racial polity, expanding participation strengthens the grip of the white majority, since whites set the agenda and determine who participates and how.”).

¹⁸⁴ See, e.g., Roberts, *supra* note 20, at 107 (“[T]he courts . . . are the very state agents that have eviscerated efforts to install a more radical Constitution and have been hostile to an abolitionist

from elite institutions¹⁸⁵ and committed to grounding all work and the new democracy in the substantive and lived experiences of people.¹⁸⁶ Kaba summarizes these components, describing work as abolitionist when it “[does] not rely on the court, prison, and punishment system[] to try to envision a more expansive view of justice.”¹⁸⁷

Abolitionists’ strong rejection of prison reform as a solution to the problem of the prison industrial complex should not be mistaken with a reluctance to act now, in ways small and big, to work towards the democracy abolitionists wish to see.¹⁸⁸ Rather, abolitionists have developed nuanced frameworks to distinguish between which small changes support abolitionist aims, versus those that inadvertently bolster punishment systems. For abolitionists, one of the key differences between problematic reforms and acceptable ones is whether those reforms entail “community self-determination and accountability.”¹⁸⁹ Reforms that fail to “shift centers of power and control” are considered problematic and insufficient.¹⁹⁰

One of the central elements of the abolitionist theory of change is the building of stronger, localized abolition democracies now. Much of current abolitionist work focuses on bread-and-butter decarceration: waging campaigns to free individuals—particularly political activists¹⁹¹—from prison

approach. Radicals of color have criticized the presumption . . . that ‘minorities are best protected with national oversight, rights-based frameworks, and judicial solicitude.’”).

¹⁸⁵ See, e.g., Roberts, *supra* note 129, at 1599 (“[T]he criminal justice system is not a democratic institution that needs to be more inclusive . . . nor does its exclusion of black people result from bureaucratic malfunction. Rather, the law enforcement bureaucracy is designed to operate in an anti-democratic manner. Therefore, democratizing criminal law requires an abolitionist—not reformist—approach.”).

¹⁸⁶ See, e.g., Akbar, *supra* note 22, at 413 (“For radical racial justice movements, the primary commitment is not to law, its legitimacy, rationality, or stability: It is to people.”).

¹⁸⁷ Dan Sloan, *A World Without Prisons: A Conversation with Mariame Kaba*, LUMPEN MAG. (Apr. 7, 2016), <https://overthrowpalacehome.files.wordpress.com/2019/02/a-world-without-prisons-a-conversation-with-mariame-kaba-e28093-lumpen-magazine.pdf> [<https://perma.cc/FN2E-7KML>].

¹⁸⁸ See, e.g., Kaba & Duda, *supra* note 17 (“I don’t know a single [abolitionist] who doesn’t support *some* reforms.”).

¹⁸⁹ KARAKTSANIS, *supra* note 120, at 94.

¹⁹⁰ *Id.* One distinction abolitionists have made is between “reformist reforms” that feed the prison system and steps towards abolition that “reduce its overall impact and grow other possibilities for wellbeing.” *Reformist Reforms vs. Abolitionist Steps to End Imprisonment*, CRITICAL RESISTANCE (2021), http://criticalresistance.org/wp-content/uploads/2021/02/CR_abolitioniststeps_antiexpansion_2021_eng.pdf [<https://perma.cc/QJL6-YCP2>].

¹⁹¹ For example, the Formerly Incarcerated, Convicted People and Families Platform calls for the liberation of political prisoners, explaining: “Over the past fifty years, liberation struggles and resistance to repression, both in domestic and international relations, have produced a great deal of turmoil. Individuals and groups took actions, or affiliated with others, in ways that were deemed criminal in the U.S. courts of law.” Formerly Incarcerated, Convicted People and Families Platform, *Our Platform*, <https://ficmpmovement.files.wordpress.com/2012/01/ficmp-platform.pdf> [<https://perma.cc/C6LQ-MQVX>].

through commutations and other legal processes¹⁹² and shrinking private financial investment in and ties to the private prison industry.¹⁹³ The COVID-19 pandemic, in particular, has led to strong abolitionist calls for the immediate and mass release of incarcerated people, who are “one of the most vulnerable groups in this time.”¹⁹⁴ Community bail funds, which grew enormously in 2020, became a key means to execute this strategy.¹⁹⁵ The pandemic also drew

¹⁹² Some campaigns to free individual people have focused on people convicted for defending themselves against intimate partner and other forms of interpersonal violence. For example, Let's Get Free: The Women and Trans Prisoner Defense Committee, a group “working to end Death by Incarceration (also known as life without parole sentencing)” by “build[ing] a pathway out of the prisons back to our communities through commutation reform” and other strategies, successfully advocated for the release of four women who were sentenced to die in prison for actions taken in self-defense when they were teenagers. *Let's Get Free: The Women and Trans Prisoner Defense Committee*, LETS GET FREE, <https://letsgetfree.info> [<https://perma.cc/22F7-9M3R>]; see also Commutations Campaign, SURVIVED AND PUNISHED, <https://survivedandpunished.org/commutations-campaign> [<https://perma.cc/ZGN4-8YFQ>] (describing a national network's work to end the “abuse to prison” pipeline in which “survivors of domestic and sexual violence” are “criminalized while attempting to navigate dangerous conditions of abuse and coercion” through commutations processes). For a zine—a self-published, non-commercial educational tool—exploring one early instance of the criminalization of survival, see VICTORIA LAW, RESURRECTING RUBY: A MODERN RETELLING (2021), https://issuu.com/projectnia/docs/resurrecting-ruby-pages__1_ [<https://perma.cc/P5XZ-F8B2>], which illustrates the story of Ruby McCollum, who was convicted of murder for shooting her abusive lover, as investigated by Zora Neal Hurston.

¹⁹³ See, e.g., Mike Ludwig, *Big Banks Are Divesting From Private Prisons, Thanks to Anti-ICE Activism*, TRUTHOUT (July 23, 2019), <https://truthout.org/articles/big-banks-are-divesting-from-private-prisons-thanks-to-anti-ice-activism> [<https://perma.cc/6DPF-BDWB>] (describing successful campaigns pushing major banks such as JPMorgan Chase and Wells Fargo to divest from private prisons).

¹⁹⁴ *Abolitionist Steps to Combat COVID-19 Behind Bars*, CRITICAL RESISTANCE, <https://mailchi.mp/criticalresistance/abolitionist-steps-to-combat-covid-19-behind-bars> [<https://perma.cc/Y2ZL-N4XZ>] (calling for the release of all people with underlying health conditions and who are fifty years old or older or pregnant, all those being held pretrial, and those in immigration detention centers, among other measures to curb the compounding effects of COVID-19 and the prison industrial complex). Bret Grote, the legal director of the Abolitionist Law Center remarked in response to Pennsylvania Governor Tom Wolf's slow rate of commutations during the pandemic: “Wolf needs to be clearing the prisons out by the thousands on public health and racial justice grounds. Instead, he is dawdling on even the easiest cases.” Joshua Vaughn, *Three Pennsylvania Men Were Recommended for Commutations. They're Still in Prison*, APPEAL (May 18, 2020), <https://theappeal.org/three-pennsylvania-men-were-recommended-for-commutations-theyre-still-in-prison> [<https://perma.cc/6B3P-FQEC>].

¹⁹⁵ Bail funds “achieved a new level of mainstream attention after the May killing of George Floyd” and since then have received more than \$75 million in donations from more than 3.5 million people. Nicholas Kulish, *Bail Funds, Flush with Cash, Learn to 'Grind Through this Horrible Process'*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/business/bail-funds.html> [<https://perma.cc/5AHD-ASUP>]. The funds are particularly effective de-carceral tools because of the “huge number of people every year”—sixty percent of people in jail “on any given day”—whose cases will not be pursued, but who cannot afford to pay for their release. Jia Tolentino, *Where Bail Funds Go From Here*, NEW YORKER (June 23, 2020), <https://www.newyorker.com/news/annals-of-activism/where-bail-funds-go-from-here> [<https://perma.cc/WEW6-A7TA>]. The cash bail system, in keeping with policing and prison systems generally, is also highly racialized: economic disparities affecting who can afford to pay bail and racism in the assignment of bail amounts between white and Black people leads to a double bias against Black detainees. *Id.*

attention to another fundamental abolitionist practice: mutual aid. Mutual aid projects have long been a part of abolitionist work, but like bail funds, gained greater attention as communities responded to COVID-19.¹⁹⁶

In addition to the decarceral action and mutual aid, abolitionists are carrying out a range of lesser-recognized programs and campaigns to exert community influence over local and state government decisions. This includes advocating new economic models, such as Black-owned worker's cooperatives, to challenge the current distribution of power;¹⁹⁷ urging cities and local officials to close prisons, prevent the construction of new jails, and divest from the private prison industry;¹⁹⁸ calling for reparations for past state violence;¹⁹⁹ developing new models to ensure access and control of land and affordable housing;²⁰⁰ building restorative and transformative justice

¹⁹⁶ Rebecca Solnit, *The Way we Get Through This is Together: The Rise of Mutual Aid Under Coronavirus*, GUARDIAN (May 14, 2020, 1:00 AM), <https://www.theguardian.com/world/2020/may/14/mutual-aid-coronavirus-pandemic-rebecca-solnit> [<https://perma.cc/UW6Z-J8DN>] (describing the rise of mutual aid during the coronavirus as “a superbloom of altruistic engagement” in the form of “aid offered in a spirit of solidarity and reciprocity, often coming from within struggling communities, empowering those aided, and with an eye towards liberation and social change”); ALEXANDRIA OCASIO-CORTEZ & MARIAME KABA, MUTUAL AID 101: #WEGOTOURBLOCK (2020), <https://mutualaiddisasterrelief.org/wp-content/uploads/2020/04/NO-LOGOS-Mutual-Aid-101-Toolkit.pdf> [<https://perma.cc/8VZC-YL94>] (providing step by step instructions for carrying out mutual aid during and after the COVID-19 crisis).

¹⁹⁷ See, e.g., Formerly Incarcerated, Convicted People and Families Platform, *supra* note 191 (demanding sustainable economic development through reinvesting funds spent on prisons into communities); MANDELA GROCERY COOP, <https://www.mandelagrocery.coop> [<https://perma.cc/A5YB-YX2Y>] (“The Worker Co-op model is an effective tool for creating long-term, dignified jobs, particularly in urban low-income communities. . . . Our business model empowers us to build up our own communities.”).

¹⁹⁸ See, e.g., NO NEW JAILS, *supra* note 112, at 3 (“No New Jails NYC is a grassroots campaign committed to closing Rikers now without building new jails and rerouting \$11 billion away from jail construction and towards the needs of our communities.”); *About Decarcerate PA*, DECARCERATE PA, <https://decarceratepa.info/about> [<https://perma.cc/4NPN-WJZN>] (demanding “an immediate and lasting moratorium on all new prisons”); Lewis Kamb, *Protester of Youth Jail Block Seattle Construction Site in Latest Attempt to Halt Project*, SEATTLE TIMES (Mar. 26, 2018 at 1:06 pm), <https://www.seattletimes.com/seattle-news/crime/protesters-of-youth-jail-block-seattle-construction-site> [<https://perma.cc/Q4YU-Y2GC>] (explaining community efforts to protest and disrupt the construction of a youth jail in Seattle).

¹⁹⁹ See, e.g., THE MOVEMENT FOR BLACK LIVES, *supra* note 31, (calling for “[t]he retroactive decriminalization . . . and reparations for the devastating impact of the ‘war on drugs’ and criminalization of prostitution, including a reinvestment of the resulting savings and revenue into restorative services, mental health services, job programs and other programs supporting those impacted by the sex and drug trade.”).

²⁰⁰ See, e.g., KARAKATSANIS, *supra* note 120, at 96-97 (describing how “[o]rganizers in Cleveland, Detroit, the Bay Area, and elsewhere are cultivating economic models that change distributions of power, such as worker-owned cooperatives”); see also *Escalate: Organizing*, ASSATA’S DAUGHTERS, <https://www.assatasdaughters.org/escalate-organizing> [<https://perma.cc/SUP2-A6SX>] (describing environmental justice programs “as an integral part of Black liberation”).

practices;²⁰¹ training young people of color and community members of all ages in movement-building tools including political organizing;²⁰² and working with “city managers and residents of prison towns” to collaborate with unions and “write handbooks and advise rural and regional development experts on alternative projects.”²⁰³

An additional and powerful means through which abolitionists leverage community power over governance is through city budgeting processes.²⁰⁴ Indeed, the growing movement to defund police in 2020²⁰⁵ brought about an unprecedented level of attention to and participation in the budgeting processes of cities across the United States.²⁰⁶ One example of the abolitionist and participatory budgeting process in action is the Los Angeles People’s Budget.²⁰⁷

²⁰¹ For example, in Chicago, weekly Peace Circles welcome people, especially young men, to attend, discuss their experiences, and unlearn the logic of policing and jails. Maya Dukmasova, *Abolish the Police? Organizers Say It’s Less Crazy Than It Sounds*, CHICAGO READER (Aug. 26, 2016), <https://www.chicagoreader.com/chicago/police-abolitionist-movement-alternatives-cops-chicago/Content?oid=23289710> [https://perma.cc/CFF2-TA5V]; see MARIAME KABA & SHIRA HASSAN, FUMBLING TOWARDS REPAIR: A WORKBOOK FOR COMMUNITY ACCOUNTABILITY FACILITATORS (2019) (presenting facilitation tips and activity suggestions for people engaged in community accountability processes addressing interpersonal harm and violence).

²⁰² See, e.g., Our Politics, ASSATA’S DAUGHTERS, <https://www.assatasdaughters.org/our-politics-2019> [https://perma.cc/PH73-JW2H] (working to achieve the liberation of Black people through holistic investment in Black youth, including through their political education).

²⁰³ Ruth Wilson Gilmore and James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [https://perma.cc/FW3X-9A6E].

²⁰⁴ See, e.g., THE CTR. FOR POPULAR DEMOCRACY, L. FOR BLACK LIVES & BLACK YOUTH PROJECT 100, FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 84, <https://static1.squarespace.com/static/5500a55ae4b05a69b3350e23/t/595cf69b1b631b031e0542a5/1499264677929/Freedom+to+Thrive+Web.pdf> [https://perma.cc/PK3T-SQQJ] (promoting “participatory budgeting,” a “democratic process in which community members decide how to spend a portion of a public budget” that “gives the community decision-making power over government funds”).

²⁰⁵ Akbar, *supra* note 25, at 107, 111 (describing the growth of the “defund” movement out of “decades of abolitionist organizing against the carceral state”).

²⁰⁶ Farah Stockman & John Eligon, *Cities Ask if It’s Time to Defund Police and “Reimagine” Public Safety*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/05/us/defund-police-floyd-protests.html> [https://perma.cc/63S4-WQ8P] (“Across the country, calls to defund, downsize or abolish police departments are gaining new traction after national unrest following the death of George Floyd . . .”); Kristin Musulin & Cailin Crowe, *Calls to “Defund the Police” Are Upending FY21 Budgets. Here’s How.*, SMART CITIES DIVE (Jan. 26, 2021), <https://www.smartcitiesdive.com/news/calls-to-defund-the-police-are-upending-fy21-budgets-heres-how/581163> [https://perma.cc/UF88-Z3ZN] (noting that the widespread activism calling for change to city budgeting processes has meant that “as U.S. cities finalize and tap into their operational budgets for FY21, they are under the microscope of communities calling for change”); INTERRUPTING CRIMINALIZATION, THE DEMAND IS STILL DEFUND THE POLICE 6 (2021), <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/60806839979abc1b93aa8695/1619028044655/%23DefundThePolice%2BUpdate.pdf> [https://perma.cc/X5ZZ-38YD] (“There’s a shift happening right now. The call to defund police is louder than we’ve ever heard it.”).

²⁰⁷ PEOPLE’S BUDGET LA, <https://peoplesbudgetla.com> [https://perma.cc/52F5-AJW4]. For a similar abolitionist resource about the New York City budget, see ABOLITIONIST RECOMMENDATIONS

The platform, designed by a coalition led by Black Lives Matter Los Angeles, calls for “a city budget that invests in the wellbeing of our communities with priority on supporting the underserved and marginalized.”²⁰⁸ The coalition supported Measure J, a proposal that Los Angeles voted to pass in November of 2020, which will ensure that ten percent of “locally generated, unrestricted county money—estimated between \$360 million and \$900 million”—will be reserved for social services and cannot be spent on punishment systems.²⁰⁹ In Chicago, activists drew attention not just to the general city budget, but to the city’s use of federal COVID-19 relief funds, sharply critiquing Chicago’s decision to allocate almost a quarter of the COVID-19 relief money to police.²¹⁰ But the effects of a more democratic and participatory budgeting process in the past year reach far beyond Los Angeles and Chicago—activists nationwide reduced \$840 million dollars from police departments while increasing \$160 million in investment towards community needs.²¹¹

The impact of these multivariate actions is profound. As Professor McLeod writes, the “Movement for Black Lives has reshaped public discourse on crime, policing, and race. But the movement has also revitalized local democratic politics, reshaping local and state budgeting efforts, in large part by organizing communities to actively redirect their own state and local governments.”²¹² Jeremy Tyler, the Co-Chair of BYP100’s Chicago Chapter, describes talking to community members during outreach canvassing as a challenge to assume power:

TO DEFUND NYPD, WITH NO NEW JAILS + BY CLOSING RIKERS (2021), <https://drive.google.com/file/d/198Yh4hrPY78j-q6bV2nHMAgoD6axHDt6/view> [<https://perma.cc/46V4-8P57>].

²⁰⁸ PEOPLE’S BUDGET LA, *supra* note 207.

²⁰⁹ Jaclyn Cosgrove, *L.A. County Voters Approve Measure J, Providing New Funding for Social Services*, L.A. TIMES (Nov. 4, 2020), <https://www.latimes.com/california/story/2020-11-03/2020-la-election-tracking-measure-j> [<https://perma.cc/NA6W-JVJ3>] (reporting that the measure passed with 60 percent of the country voters in support).

²¹⁰ Trone Dowd, *Chicago’s Mayor Gave More than \$280 Million in COVID Relief Money to the Cops*, VICE (Feb. 18, 2021, 2:05 PM), <https://www.vice.com/en/article/wx8a8m/chicago-mayor-lori-lightfoot-gave-millions-covid-relief-police> [<https://perma.cc/8LX7-49KT>] (“Of the \$1.2 billion in COVID-19 relief Chicago received from the federal government last year, Mayor Lori Lightfoot put \$281.5 million toward police duties . . .”); Grace Del Vecchio, 4 *Actual Proposals for Cutting Chicago’s Police Budget Now*, INJUSTICE WATCH (Nov. 23, 2020), <https://www.injusticewatch.org/news/police-and-prosecutors/2020/proposals-cuts-chicago-police-budget> [<https://perma.cc/Y8JX-M4D9>] (describing the development of the “Peace Book”—a budget proposal that would reallocate two percent of the police budget to violence prevention programs).

²¹¹ INTERRUPTING CRIMINALIZATION, *supra* note 206, at 4-5. *But see* Fola Akinnibi, Sarah Holder & Christopher Cannon, *Cities Say They Want to Defund the Police. Their Budgets Say Otherwise*, BLOOMBERG CITY LAB (Jan. 12, 2021), <https://www.bloomberg.com/graphics/2021-city-budget-police-funding> [<https://perma.cc/SD52-KPWG>] (reporting that the “[e]ven as the 50 largest U.S. cities reduced their 2021 police budgets by 5.2% in aggregate—often as part of broader pandemic cost-cutting initiatives—law enforcement spending as a share of general expenditures rose slightly to 13.7% from 13.6%” as many cities “watered down or put on pause” changes proposed or passed earlier in the year).

²¹² McLeod, *supra* note 22, at 1637 (footnotes omitted).

We're reminding people that hey, the city has taken money from you as the tax payer . . . and the biggest investment right now in this area from the city is the squad car right there and the two officers sitting in it. . . .' So when we have these conversations, we're like: what else do you want to see?²¹³

In these conversations and projects, abolitionist groups are making visible the lines of authority from communities to cities and the power those communities can and should have over decisions that affect their lives. Notably, unlike voting, almost none of these actions requires that a person have U.S. citizenship, no prior contact with the criminal justice system, or a large amount of disposable income in order to participate.²¹⁴ While some of this work entails electoral choices, most projects involve people in influencing the decisions of their government *beyond the ballot* and continuously, during election years but also in the long periods between elections.

C. *Abolitionists on Voting and Elections*

One of the striking differences that emerges in comparing the diverging views of democracy as presented by law of democracy scholars and by abolitionists is the differing levels of centrality each field accords to voting and elections. Given this difference, a question remains: how do abolitionists view electoral politics in relation to the effort to decarcerate and build the democracy they desire? Unsurprisingly for such a heterogenous movement, views diverge.²¹⁵ At least two camps within abolitionist movements are discernable. The first sees elections as unworthy of engagement, with reasons ranging from a belief that elections are simply inept at achieving change to one that voting is a morally compromised endorsement of the current

²¹³ Interview with Jeremy Tyler, Co-Chair, Black Youth Project 100, Chicago Chapter, in Chi., Ill. (Feb. 22, 2021).

²¹⁴ Participating in organizing work does require time, which many people do not have. Abolitionist groups try to account for this by providing childcare and other supports to activists and, wherever possible, to pay activists for their work. See NO NEW JAILS, *supra* note 112, at 23 ("Mutual aid is at the heart of this work."); see also Kaba & Duda, *supra* note 17 (discussing the difficulties low-resourced communities face in sustaining neighborhood-based action).

²¹⁵ Abolitionists themselves emphasize the decentralized and diverse nature of the prison abolition movement. See Hannah Black, *The Work Continues: Hannah Black Interviews Mariame Kaba*, DIS, <http://dismagazine.com/discussion/83677/mariame-kaba-and-hannah-black> [<https://perma.cc/MW7K-NGGF>] ("When people talk about [Black Lives Matter] and they kind of focus in on just one small thing, that's kind of an insult to the multitude of organizations and individuals who are organizing underneath a large umbrella of what they see as a struggle for Black Liberation." (quoting Mariame Kaba)). When it comes to the role of voting and electoral politics in broader abolition organizing, Mariame Kaba has observed that "[i]t's been very interesting to me to watch how different factions have responded to this issue of elections," noting how some groups have repudiated participation in elections altogether, while others have endorsed specific candidates. *Id.*

system.²¹⁶ A second, larger camp sees elections and voting as one of many tools available to abolitionists, insufficient by itself to bring about change but still important, nonetheless.²¹⁷

For a variety of reasons, those in the first camp reject the idea that elections are meaningful pathways to change. No New Jails explicitly eschews electoral advocacy, stating in its Guide to Close Rikers Island that “[w]e are not in a democracy; we cannot use the electoral process to address our needs.”²¹⁸ Some Black Lives Matter activists have also rejected electoral advocacy and voting, sensitive to the way political parties sometimes take the Black vote for granted.²¹⁹ Many activists in 2016 expressed feeling betrayed by the Obama Administration, which, though initially a cause for hope, produced disappointing outcomes for Black communities.²²⁰ Charlene Corruthers, former director of Black Youth Project 100, explains that President Obama showed her the “limitations of any politician to change our lives or transform our lives.”²²¹ Hari Ziyad, writing on the Black Youth Project online platform, echoes this conclusion: “I filled out a bubble for Obama twice, but the 384 to 807 dead civilians killed in drone strikes under his reign aren’t in my interests. Deporting 2.5 million undocumented persons during his first 6 years isn’t in my interests.”²²² Activists in this camp cite Black radical leaders including Du Bois, Malcolm X, Assata Shakur, and James Baldwin, who they read as having

²¹⁶ See, e.g., NO NEW JAILS, *supra* note 112, at 2 (expressing a commitment to disrupting electoral politics in order to achieve abolitionist goals).

²¹⁷ See *infra* notes 231–33 (illustrating the clear-eyed approach some abolitionists take to electoral advocacy) and 241–52 (providing examples of abolitionists engaging in voter engagement work and electoral politics related advocacy).

²¹⁸ NO NEW JAILS, *supra* note 112, at 10.

²¹⁹ Hank Newsome, a Black Lives Matter Activist, led a campaign in 2016 to withdraw support from both major political parties. Newsome decided not to vote and promoted the “I Ain’t Voting” campaign because “Black Americans have a chance right now collectively to say to the Democrats: ‘Hey, if you guys don’t give us criminal justice reform, we’ll give the country to Donald Trump.’” Leo Hornak, *Some Black Lives Matter Activists Plan Not to Vote in November*, THE WORLD (July 20, 2016, 11:30 PM), <https://www.pri.org/stories/2016-07-20/i-aint-voting-will-black-lives-matter-reject-right-vote> [<https://perma.cc/H2VF-LK6D>] (quoting Hank Newsome); see also Jenn M. Jackson, *It’s Simple. I Choose Neither Hillary nor Bernie*, BLACK YOUTH PROJECT (Jan. 29, 2016), <http://blackyouthproject.com/its-simple-i-choose-neither-hillary-nor-bernie> [<https://perma.cc/4TCP-ABTG>] (“Mrs. Clinton and Mr. Sanders are going to have to do a lot to get someone like me to vote this November. And, by ‘a lot’ I mean more than either of them seems to care to do this campaign season. That is where we are now.”).

²²⁰ See Steven W. Thrasher, *This Was the Election of Disillusionment*, GUARDIAN (Nov. 8, 2016), <https://www.theguardian.com/commentisfree/2016/nov/08/this-was-the-election-of-disillusionment> [<https://perma.cc/3KXR-9GXA>] (describing how some young people voted for Obama, “only to discover that having a black president didn’t change how black people are disproportionately unemployed, arrested, incarcerated and killed by police,” and concluding that “it’s little wonder that early voting is down among black voters”).

²²¹ Piven, *supra* note 31.

²²² Ziyad, *supra* note 26.

questioned the efficacy of voting, even for liberal political parties.²²³ Others point to the ability to challenge unjust systems beyond the vote. “Black people can and do resist whiteness in a number of ways, both big and small, that do not involve the vote,” writes Ziyad.²²⁴

Many abolitionists who choose not to vote are frustrated by efforts that urge them into electoral participation, but that don’t take seriously their critiques of American democracy. Ziyad speaks to the exasperation some Black non-voters feel when judged and criticized for not voting,²²⁵ arguing that, “Black, poor, queer, and Indigenous people have made the strongest arguments for divesting from this two party political system, and always have.”²²⁶ Some abolitionists—even those who do vote—urge respect for those

²²³ Questioning the efficacy of participation in and legitimacy of elections is hardly a recent development. Journalist Eugene Scott explains that after emancipation, “[w]hile some Black thinkers and abolitionists entertained ideas of citizenship, others believed that formerly enslaved people could never be treated equally and with respect, so they advocated for racial separatism or emigration to the Caribbean or western Africa.” Eugene Scott, *The National Negro Conventions*, in *FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA 1619–2019*, at 198 (Ibram X. Kendi & Keisha N. Blain eds., 2021). Almost a century later, Assata Shakur expressed a similar ambivalence:

I remember how i felt in those days. I wanted to be an amerikan just like any other amerikan. I wanted a piece of amerika's apple pie. I believed we could get our freedom just by appealing to the consciences of white people. I believed that the North was really interested in integration and civil rights and equal rights. I used to go around saying “our country,” “our president,” “our government”. . . . I believed that we Black people were really making progress and that the government, the president, the supreme kourt, and the congress were behind us, so we couldn't go wrong. I believed that if white people could go to school with us, live next to us, work next to us, they would see that we were really good people and would stop being prejudiced against us. I believed that amerika was really a good country, like my teachers said in school I grew up believing that stuff. Really believing it. And, now, twenty-odd years later, it seems like a bad joke. Nobody in the world, nobody in history, has ever gotten their freedom by appealing to the moral sense of the people who were oppressing them.

ASSATA SHAKUR, ASSATA SHAKUR: AN AUTOBIOGRAPHY 151 (1987); see also Hari Ziyad, *Not Voting is Not a 'Privilege'*, BLACK YOUTH PROJECT (Oct. 12, 2016), <http://blackyouthproject.com/not-voting-is-not-a-privilege> [https://perma.cc/gP68-XQWW] (“It is a privilege to erase the history of Black thinkers like Assata Shakur, James Baldwin, and W.E.B. Du Bois, who have questioned the validity of voting for the liberal party for numerous well-thought out reasons . . .”).

²²⁴ Ziyad, *supra* note 26.

²²⁵ See, e.g., Dahleen Glanton, *The Hypocrisy of the 'Woke' Americans Who Don't Vote*, CHICAGO TRIBUNE (Oct. 18, 2018, 5:00 AM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-no-voting-family-dahleen-glanton-20181017-story.html> [https://perma.cc/C7G5-NXLH] (“In my opinion, if you don't vote, you lose the right to complain.”); Brandon Simeo Starkey, *Black People Who Didn't Vote Let Us Down, Too*, THE UNDEFEATED (Dec. 16, 2016), <https://theundefeated.com/features/black-people-who-didnt-vote-let-us-down-too> [https://perma.cc/6F75-YNX5] (“Those who didn't vote failed to be their brother's keeper and be responsible civic actors. They need to get it together. By calling them out publicly, I seek to help them do just that.”).

²²⁶ Ziyad, *supra* note 223. Alfred Nfared Vines echoes Ziyad: “[V]oting is a political event that is extremely multifaceted, particularly for people of color in this country.” Alfred Nfared Vines, *Shut Up Telling Others to Shut Up and Go Vote*, MEDIUM (Nov. 8, 2018), <https://alfrednfaredvines.com>.

who feel they would be acting “against their moral compass” by voting and who instead choose to “not endorse a two-party system that has and continues to engage in colonialism, imperialism, and white supremacy.”²²⁷ Ziyad tackles the common refrain, hinted at even by President Obama,²²⁸ that people who don’t vote don’t have a right to criticize the government: “[H]aving different opinions on what is ultimately helpful should never be used as a weapon to silence Black people who mourn their dead while dis-investing from an electoral system that doesn’t even care to remember their names.”²²⁹

Still, viewpoints that completely disavow voting and elections seem to be in the minority as many major abolitionist leaders and organizations choose to engage with electoral politics.²³⁰ In this camp, activists see elections as one tool among many and the right to vote as important, though not independently sufficient to bring about the transformative change abolitionists seek.²³¹ Mariame Kaba includes electoral advocacy in her work, explaining that:

Politics are politics, and that means that electoral politics are part of the larger politics that we engage in in the world and in the country, so I definitely use elections to either figure out who I don’t want to have in office anymore, who needs to go, so it’s a measure of accountability of some sort, or it’s a way to figure out how to use the fact that there is an election to raise a certain issue.²³²

Nonetheless, Frances Fox Piven observes that while “activists by no means reject electoral politics, they don’t rely on it either,” instead preferring “disruptive collective action,” or more succinctly “movements.”²³³

medium.com/shut-up-telling-others-to-shut-up-and-go-vote-9f4b481f4570 [https://perma.cc/WRF8-PQKD] (arguing that the frustration and disillusionment people of color feel with voting is valid and should be taken seriously).

²²⁷ Rann Miller, *5 Tips for Engaging Non-Voters This Election*, BLACK YOUTH PROJECT (Oct. 4, 2019), <http://blackyouthproject.com/5-tips-for-engaging-non-voters-this-election> [https://perma.cc/EG4S-LVKF].

²²⁸ *Transcript of Barack Obama’s Sept. 7, 2018 Speech at the University of Illinois*, INSIGHT NEWS (Sept. 8, 2018), https://www.insightnews.com/news/transcript-of-barack-obamas-sept-7-speech-at-the-university-of-illinois/article_648b4418-b2da-11e8-8514-cbd9a8970df6.html [https://perma.cc/GLU4-4F73] (“So if you don’t like what’s going on right now—and you shouldn’t—do not complain. Don’t hashtag. Don’t get anxious. Don’t retreat. Don’t binge on whatever it is you’re bingeing on . . . Don’t put your head in the sand. Don’t boo. Vote.”).

²²⁹ Ziyad, *supra* note 26.

²³⁰ See *infra* notes 241–52 (providing examples of abolitionist engagement with electoral politics and voter advocacy).

²³¹ Akbar, *supra* note 25, at 107 (“The almost century-long history of mass protest sparked by police violence combined with this year’s protests suggests the power of police violence to mobilize people in ways that electoral reform projects are unlikely to do today.”).

²³² Black, *supra* note 215.

²³³ Piven, *supra* note 31. Angela Davis recently remarked, “I’ve pointed out many times that the electoral arena is not, by itself, going to bring about change.” Bates College, The Rev. Dr. Martin Luther King Jr. Day Keynote, at 46:44, YOUTUBE (Jan. 18, 2021), https://www.youtube.com/watch?v=MQs9N_icnqc [https://perma.cc/3NRH-GLDS]; see also Mon Mohapatra & Rachel Foran, *Abolitionists Want You to Imagine a Better World Beyond the Ballot Box*, HARPER’S BAZAAR (Nov.

Many activists have similar views. In 2016, Brittany Packnett Cunningham, a BLM leader, spoke to and admitted sharing the frustration of her peers when deciding to vote for Hillary Clinton:

I have heard so many young people, especially young people of color, express a great deal of frustration about this particular election. They feel we participated in our democracy and our government abused us. They met our cardboard signs with tear gas. They met our cell phones with pepper spray. These young people are understandably asking, ‘What is the point of continuing to participate in this system that assaults me?’²³⁴

Packnett Cunningham offers empathetic and real acknowledgement of the painful disillusionment of young people of color, what Professor Tillet calls “racial melancholia.”²³⁵ And yet this acknowledgement is balanced with Kaba’s pragmatism—a willingness to use the tools available to the movement, including the public discussion surrounding elections and other benefits of electoral advocacy.²³⁶

In 2020, abolitionists confronted a particularly daunting challenge when deciding whether or not to vote for Joe Biden, who many consider inseparable from the development of the prison industrial complex due to his role in enacting the 1994 Crime Bill.²³⁷ Angela Davis, however, decided to support his candidacy, explaining:

11, 2020, 3:03 PM), <https://www.harpersbazaar.com/culture/politics/a34589742/abolition-joe-biden-election/> [<https://perma.cc/GYR6-CPTA>] (“The fight for a world where people have what they need, without relying on police and prisons to keep us safe, does not start or stop with elections.”).

²³⁴ Melissa Harris-Perry, *Black Lives Matter Activist Brittany Packnett On Why She’s Finally #WithHer*, ELLE (Oct. 21, 2016) <https://www.elle.com/culture/career-politics/news/a40176/brittany-packnett-hillary-clinton-endorsement> [<https://perma.cc/5NAY-XJDJ>].

²³⁵ TILLET, *supra* note 164, at 139 (“African Americans who are continually estranged from the nation wrestle with feelings of disillusionment, mourning, and yearning, as well as the material effects of black economic vulnerability.”).

²³⁶ See *supra* note 232 and accompanying text (explaining Kaba’s position that elections are but one tool for transformative change); see also Akbar, *supra* note 25, at 99 (describing the electoral engagement of leftist and grassroots movements as “a cautious embrace”).

²³⁷ Sheryl Gay Stolberg & Astead W. Herndon, *‘Lock the S.O.B.s Up’: Biden and the Era of Mass Incarceration*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/joe-biden-crime-laws.html> [<https://perma.cc/8ETN-GDTX>] (describing the signing of 1994 Violent Crime Control and Law Enforcement Act as the culmination for President Joe Biden’s “decades-long effort to more closely marry the Democratic Party and law enforcement, and to transform the country’s criminal justice system in the process”); Sean Collins, *Black Voter Turnout Was Down in 2016. This Time it Looks to Be Different*, VOX (Oct. 30, 2020, 8:30 AM), <https://www.vox.com/21529165/black-voters-swing-states-trump-biden> [<https://perma.cc/PG2L-XT8V>] (describing the concerns of many Black voters who “bring up a 1994 crime bill as a reason they can’t get behind Biden”); see also Matt Harvey, *Black Chicago Youth are Disenchanted by 2020 Election Options, but Hope for a Progressive Future*, INJUSTICE WATCH (Oct. 28, 2020), <https://www.injusticewatch.org/commentary/2020/young-black-chicago-voters-the-tribe> [<https://perma.cc/6ZLR-YMBZ>] (“While all four [of the youth interviewed] have reasoned that

Biden is very problematic in many ways—he is, not only in terms of his past and the role that he played in pushing toward mass incarceration, but he has indicated that he is opposed to disbanding the police. . . . [But] Biden is far more likely to take mass demands seriously.²³⁸

“This coming . . . election,” she reasoned, “will ask us not so much to vote for the best candidate but to vote for or against ourselves.”²³⁹

As a whole, the BLM movement seems to have adopted a similarly balanced position between pragmatism and realism. In her recent history of the Movement, Professor Barbara Ransby refers to the co-founder of BLM’s Electoral Justice Project, Jessica Byrd, as having “no illusions that elections alone will liberate the Black people.”²⁴⁰ And yet, the Movement has launched a plethora of election-related action. Since 2016 and the initial reluctance of some Movement leaders to cast votes or engage in electoral politics, many BLM activists have turned their attention to the electoral system much more directly. DeRay McKesson, a once prominent BLM organizer, ran for elected office as the mayor of Baltimore.²⁴¹ The Movement for Black Lives launched the Electoral Justice Voter Fund, which seeks: to ensure that “millions of Black citizens are able to successfully access and participate in their right to democracy”; to distribute resources so as to “strengthen local power building and address enduring systemic barriers”; and to build a democracy where “Black voters are engaging in meaningful, Black-led civic engagement to ensure the well-being and safety of all Black people.”²⁴² In the summer of 2019, BLM launched the What Matters 2020 campaign, working to harness the momentum of the 2020 election to “center what matters and demand change” because “[u]ntil black people are free, no one is fully free.”²⁴³ Finally, since 2016, the Movement has been an essential participant of Get Out the

if they had to pick between the two options for president, they’d vote Biden, none of them are enthusiastic about voting in the 2020 election. A couple are likely to skip the voting booth altogether.”).

²³⁸ Going Underground on RT, *Angela Davis on Trump vs. Biden: We Must Break Out of the Corporate Capitalist Two-Party System!*, YOUTUBE (June 15, 2020), <https://www.youtube.com/watch?v=NoumWoLmeHE> [<https://perma.cc/GRL7-3Q9R>].

²³⁹ *Id.*

²⁴⁰ Piven, *supra* note 31.

²⁴¹ John Eligon, *Black Lives Matter Activist Jumps Into Baltimore Mayoral Fray*, N.Y. TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/us/black-lives-matter-activist-deray-mckesson-jumps-into-baltimore-mayoral-fray.html> [<https://perma.cc/JM7B-3ACH>].

²⁴² *The Black National Convention*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/electoraljusticevoterfund/black-national-convention> [<https://perma.cc/C5WG-HFFK>]; *Electoral Justice Voter Fund*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/electoraljusticevoterfund> [<https://perma.cc/6YRM-23KX>].

²⁴³ *#WhatMatters2020: It’s on Us! Join the Movement #BlackLivesMatter*, BLACK LIVES MATTER (Sept. 12, 2019), <https://blacklivesmatter.com/whatmatters2020-its-on-us-join-the-movement-blacklivesmatter> [<https://perma.cc/S32H-462U>].

Vote campaigns in elections ranging from local and state-wide to national—notably including the 2020 presidential election.²⁴⁴

BLM isn't alone in this type of project; other abolitionist and Black radical groups around the country have launched similar electoral initiatives. The BLM-affiliated Black Voters Matter Fund finances the registration and mobilization of Black voters throughout the country, particularly in Southern states and rural communities which “are often ignored” by candidates and elected officials.²⁴⁵ BYP100 has also worked toward voter engagement and mobilization.²⁴⁶ The Color of Change has a #VotingWhileBlack project, through which activists hosted text-a-thons encouraging voting in 2016.²⁴⁷ #WeBuiltThis, which began as a coalition between Black liberation activists and the Advancement Project, highlights the fundamental role of Black people in American history and calls on Black communities to “kick[] out the problematic politicians who fail to champion justice for us.”²⁴⁸ Even No New Jails, with its strong skepticism about the use of elections to meet the needs of Black communities, offers an electoral pledge calling “upon elected representatives and candidates seeking public office to stand firmly against jail building” and urging officials to refuse to “take money from any formal

²⁴⁴ See Vann R. Newkirk II, *How Grassroots Organizers Got Black Voters to the Polls in Alabama*, ATLANTIC (Dec. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/12/sparking-an-electoral-revival-in-alabama/548504> [<https://perma.cc/DDX8-V4PC>] (explaining the efforts of organizers and concluding that “those who wish to harness the energy of the black electorate would do well to empower the levers of black power that are already operating on their own”); Rachel Ramirez, *Black Lives Matter Helped Shaped the 2020 Election. The Movement Now Has its Eyes on Georgia*, VOX (Nov. 27, 2020, 1:00 PM), <https://www.vox.com/21591560/black-lives-matter-protests-2020-election-georgia> [<https://perma.cc/V92K-CDPE>] (“In the end, the Black Lives Matter movement and protests shaped the results of the [2020] election: Many organizers worked to get people out to vote, with Black voters turning out in droves, despite obstacles of voter suppression. Black voters also helped flip key battleground states like Georgia and Pennsylvania to elect Joe Biden . . .”).

²⁴⁵ *Our Purpose*, BLACK VOTERS MATTER FUND, <https://blackvotersmatterfund.org/our-purpose> [<https://perma.cc/E6NQ-KU26>]. The Black Voters Matter Fund provides resources specific to many states throughout the South, such as Georgia and North Carolina. *Voter Suppression in Georgia*, BLACK VOTERS MATTER FUND, <https://blackvotersmatterfund.org/stand-with-georgia> [<https://perma.cc/8DTB-G2HK>]; Black Voters Matter January 2020 Newsletter (2020), https://f6ab1eb9-96e3-4f3d-bf63-82482ab27fb6.filesusr.com/ugd/5f1e05_b0a1707aa08a410da9a6b2f5490f82b1.pdf [<https://perma.cc/M5F9-4468>]; Newkirk II, *supra* note 244.

²⁴⁶ See *Feature: Grassroots Organization BYP100 Uses “Radical Inclusion” To Combat Racial Injustice*, BLACK YOUTH PROJECT (July 24, 2019), <http://blackyouthproject.com/feature-grassroots-organization-byp100-uses-radical-inclusion-to-combat-racial-injustice> [<https://perma.cc/9LZB-UDQX>] (describing the group's organizing efforts, which include voter mobilization and ending mass incarceration).

²⁴⁷ P.R. Lockhart, *Get-Out-The-Vote Campaigns Use Black Lives Matter Language to Boost Turnout*, MOTHER JONES (Nov. 7, 2016), <https://www.motherjones.com/politics/2016/11/black-millennial-voters-election-day> [<https://perma.cc/3V7A-E2CE>].

²⁴⁸ *Why It Matters*, WE BUILT THIS, <https://webuiltthis.org/why-it-matters> [<https://perma.cc/3MP3-VY4H>]; see Lockhart, *supra* note 247 (“[People] understand that they have to be in the streets and the voting booth in numbers,” says Judith Browne Dianis, executive director of the Advancement Project, a civil rights organization that assisted with the development of the #WeBuiltThis campaign.”).

organizations complicit in our punishment system.”²⁴⁹ Again striking a delicate balance, while the organization’s pledge acknowledges the connection between elections and the prison industry, No New Jails makes clear that it does not go so far as to endorse any candidates.²⁵⁰

The November 2020 election was proof that abolitionist organizations are willing to engage in electoral politics—and that their organizing skills are strong enough to swing elections. Black voters turned out at high rates in 2020 in spite of voter suppression in many states—an effect many attribute to radical and abolitionist organizing.²⁵¹ Black Voters Matter, for example, worked with 40 grassroots organizations in the state of Georgia and formed part of the coalition that supported the election of the state’s first Black senator.²⁵² Brittany Packnett Cunningham, describing 2020, explains: “This is a pandemic election and we have to realize that we got victory here because the most oppressed and suppressed voters fought like hell to make it happen.”²⁵³ Still, she cautions: “None of us should be waiting on Joe Biden and Kamala Harris to fix everything. We are the people for this moment.”²⁵⁴

Several trends have emerged in recent abolitionist engagement with elections that are worth noting. First, the work tends to be highly local. Second, it includes races for elected office closely linked to carceral systems, such as district and state prosecutor elections. And third, it uses language that centers power building as the primary goal of electoral participation. Many abolitionist groups focus on local and citywide elections in their electoral advocacy. In 2016, #WeBuiltThis specifically refrained from focusing on the presidential election when talking to voters, discussing instead “the work that can be done, specifically at the state and local level, to effect change and to improve the material conditions of black life.”²⁵⁵ Color of Change has a decentralized approach: “We’re trying to prove that if engaged, black voters will turn out to vote . . . regardless of whether there is a presidential race.”²⁵⁶ Similarly, the #WeBuiltThis campaign had also focused on challenging *local*

²⁴⁹ *NO NEW JAILS, We Keep Us Safe ELECTORAL PLEDGE!*, NO NEW JAILS NYC, <https://www.nonewjails.nyc/electoralpledge> [<https://perma.cc/5ENM-W26Q>].

²⁵⁰ *Id.*

²⁵¹ See, e.g., Ramirez, *supra* note 244.

²⁵² Anne North, 6 *Black Women Organizers on What Happened in Georgia—And What Comes Next*, VOX (Nov. 11, 2020, 9:00 AM), <https://www.vox.com/21556742/georgia-votes-election-organizers-stacey-abrams> [<https://perma.cc/MZ38-GQ6C>].

²⁵³ TIME, *TIME Person of the Year: Joe Biden and Kamala Harris*, YOUTUBE (Dec. 10, 2020), <https://www.youtube.com/watch?v=F6HT-iYImf4> [<https://perma.cc/KP36-WNLM>].

²⁵⁴ *Id.*

²⁵⁵ Lockhart, *supra* note 247.

²⁵⁶ *Id.*

officials in Quitman, Georgia, and ultimately helped three Black candidates win seats on the city council and Board of Education.²⁵⁷

Much of the abolitionist electoral focus has—perhaps unsurprisingly given the focus on decarceration—centered on local prosecutorial and judicial elections.²⁵⁸ Progressive, grassroots groups successfully organized to vote out racist and corrupt prosecutors and to elect people, including former public defenders, running for district or state’s attorney positions on platforms to radically reduce incarceration in Philadelphia,²⁵⁹ Chicago,²⁶⁰ and San Francisco,²⁶¹ among other cities. Especially given the general lack of attention to prosecutorial elections and strong incumbent bias, victories in these races demonstrate the ability of abolitionists to wield community power to protest and disrupt systems and, where they choose, win elections.²⁶² In these efforts,

²⁵⁷ *Why It Matters*, *supra* note 248. After an investigation into alleged voter fraud, the governor of Georgia removed the three Black officials from their positions, despite a “staggering lack of evidence of fraud or coercion.” *Id.* In response, organizers “registered and engaged the increasingly diverse and young electorate in the state,” and this surge of activism led to the election of the first Black, queer woman to the Georgia Congressional delegation. *Id.*

²⁵⁸ Samantha Melamed, *These Reform Groups Helped Elect DA Larry Krasner. Now They Want to Swing Philly’s Judicial Elections*, PHILA. INQUIRER (Apr. 9, 2019), <https://www.inquirer.com/news/philly-judicial-accountability-table-elections-common-pleas-court-criminal-justice-reform-20190409.html> [<https://perma.cc/7YQ8-7SQK>] (describing the work of activists across the country and in Philadelphia, in particular, to elect more progressive, prison-abolitionist judges).

²⁵⁹ In 2017, Larry Krasner was elected Philadelphia’s District Attorney with the support of abolitionist organizations such as Decarcerate PA. Philly DA For the People, Statement: #DecarcerateDA: The Philadelphia Coalition for a Just District Attorney Statement on Nominations of Larry Krasner and Beth Grossman for Philadelphia District Attorney (2017), <https://www.phillydaforthepeople.org/wp-content/uploads/2018/04/larrywinsstatement.pdf> [<https://perma.cc/C29H-4T86>]; see Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/NGJ5-8ZFT>] (“[I]n Philadelphia [abolitionists] were central to a progressive civil rights attorney winning the district attorney primary in a landslide victory.”).

²⁶⁰ In Illinois and Ohio, organizers mobilized voters against prosecutors who had failed to bring charges against the officers responsible for the deaths of Tamir Rice and Laquan McDonald. Leon Neyfakh, *Big Wins for Black Lives Matter*, SLATE (Mar. 16, 2016, 11:01 AM), <https://slate.com/news-and-politics/2016/03/the-prosecutors-in-the-tamir-rice-and-laquan-mcdonald-cases-lose-their-primary-races.html> [<https://perma.cc/NBC9-UNMN>]; Kenrya Rankin, *#ByeAnita: Chicago Voters Oust State’s Attorney Anita Alvarez*, COLORLINES (Mar. 16, 2016), <https://www.colorlines.com/articles/byeanita-chicago-voters-oust-states-attorney-anita-alvarez> [<https://perma.cc/CTQ8-KU75>].

²⁶¹ Heather Knight, *How Chesa Boudin, a Public Defender Who Never Prosecuted a Case, Won SF D.A. Race*, S.F. CHRON. (Nov. 11, 2019, 5:39 PM), <https://www.sfchronicle.com/bayarea/heatherknight/article/How-Chesa-Boudin-a-public-defender-who-never-14826323.php> [<https://perma.cc/P3UQ-7UUM>]; Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 9, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement> [<https://perma.cc/H87Y-DPFM>].

²⁶² See Neyfakh, *supra* note 260 (noting that “voters just don’t pay attention to prosecutor races,” so incumbent defeats “represent a major victory for the Black Lives Matter movement, whose organizers have now decisively demonstrated their ability to mobilize voters and change the direction of local politics”).

however, abolitionists are clear-eyed about the limits of even so-called progressive prosecutors to make change.²⁶³

Although abolitionists may sometimes borrow traditional tools like voter registration and door knocking in this electoral advocacy, it is notable that they rarely use traditional rationales or language in discussing electoral participation. Where traditional civil rights refrains might emphasize the sacrifice of Black people for the ballot,²⁶⁴ today's abolitionists tend to describe voting and electoral advocacy as a means of building community power and the ability to self-define, rather than a means of vindicating a previous sacrifice. Dominique Apollon of RaceForward, an organization that works to increase Black participation in elections, reports: "The classic argument that 'our ancestors fought and died for the right to vote' isn't enough and doesn't wash with millennials."²⁶⁵ The Black Voters Matter Fund's language exemplifies contemporary messaging, stating: "Our goal is to increase power in our communities," and, "[e]ffective voting allows a community to determine its own destiny."²⁶⁶ BLM activists offer similar analysis, stating, "[w]e [Black voters] can use the ballot box as the next way to build power,"²⁶⁷ while the BLM Electoral Justice Project makes clear that voting isn't the Movement's only or primary tool, asking if people are "committed to using every tool at [their] disposal for Black Liberation?"²⁶⁸ In fact, perhaps responsive to the deep disillusionment activists and their communities have felt themselves, the 2019 BLM Electoral Justice Project employed language that justifies its focus on elections with abolitionist—not civil rights—logic: "Just like any other system that doesn't work for us, we can disrupt the electoral system by demanding justice—Electoral Justice!"²⁶⁹ The BLM Vision similarly calls for "political power," not merely the right to vote.²⁷⁰ And though it includes many traditional critiques of the formal electoral system, such as more Black representation and

²⁶³ See KARAKATSANIS, *supra* note 120, at 86-90 (detailing the failure of "progressive prosecutors" to refocus from crimes of the poor to crimes of the rich, prosecute their own employees for violating procedural laws, decline to prosecute drug offenses or children as adults, or generally take the radical steps needed to reduce the prison population by eighty percent in order to "return to historical U.S. levels and to those of other comparable countries.")

²⁶⁴ See Lockhart, *supra* note 247 ("Older black organizations like the Congressional Black Caucus have framed voting as a necessary responsibility for black youth, often referring to the battle for the vote during the Civil Rights Movement as proof of their obligation.").

²⁶⁵ *Id.*

²⁶⁶ *Our Purpose*, *supra* note 245.

²⁶⁷ Lockhart, *supra* note 247 (quoting Judith Browne Dianis).

²⁶⁸ *The Electoral Justice Project*, MOVEMENT FOR BLACK LIVES, <https://web.archive.org/web/20200218213501/https://ejp.m4bl.org>.

²⁶⁹ *Id.*

²⁷⁰ THE MOVEMENT FOR BLACK LIVES, *supra* note 31, at 15.

public financing for elections, the Vision also calls for increased federal and state investment into Historic Black Colleges and Universities.²⁷¹

Finally, abolitionists in both camps agree that restricting Black voters' ability to cast a meaningful vote is a problem. From national groups like BLM and the Formerly Incarcerated, Convicted People and Family National Movement to local organizations like Dream Defenders in Florida or Organizing for Black Struggle in Missouri, abolitionists demand the right to vote.²⁷² Although the bulk of this criticism focuses on the disenfranchisement of people with felony criminal records and voter suppression, some abolitionists also suggest the right should also extend to permanent residents.²⁷³

Still, it bears repeating that even where there is a consensus that the right to vote is important, no abolitionist group has adopted electoral advocacy as its primary or sole theory of change. "Civil rights are important and essential," Kilibarda writes, "but we've continuously seen how they can be undermined by the systemic violation of other social, economic, and cultural/community rights. Electoral reform is only one piece of the puzzle of longer standing social justice struggles in the U.S."²⁷⁴

²⁷¹ *Id.*

²⁷² The Movement for Black Lives calls for

the right to vote for all people including: full access, guarantees, and protections of the right to vote for all people through universal voter registration, automatic voter registration, pre-registration for 16-year-olds, same day voter registration, voting day holidays, enfranchisement of formerly and presently incarcerated people, local and state resident voting for undocumented people, and a ban on any disenfranchisement laws.

Id.; see also Dream Defenders, A Free and Flourishing Democracy (2020), <https://dreamdefenders-org.nyc3.cdn.digitaloceanspaces.com/app/uploads/2020/01/freedom-of-democracy-pdf.pdf> [<https://perma.cc/T5B9-7YS3>] ("By virtue of being born, each of us has the absolute right to vote in open elections, voting locations are easily accessible, and voting days are recognized as holidays."); *FICPM National Platform*, FORMERLY INCARCERATED, CONVICTED PEOPLE & FAMS. MOVEMENT, <https://ficpmovement.wordpress.com/about/ficpm-national-platform> [<https://perma.cc/E5YY-UU9N>] ("We demand the right to full democratic participation, inside and outside of prisons and jails. We demand the right to vote while we are incarcerated and after our release, regardless of probation or parole."); *About OBS, ORG. FOR BLACK STRUGGLE*, <https://www.obs-stl.org/about-obs> [<https://perma.cc/WX29-HYHN>].

²⁷³ See Kilibarda, *supra* note 149 (noting that disenfranchisement of permanent residents, formerly incarcerated citizens, and people experiencing homelessness contributes to the notion that "America's democracy continues to be premised on a hierarchically structured 'racial contract'"); cf. THE MOVEMENT FOR BLACK LIVES, *supra* note 31, at 15 (demanding "the right to vote for all people, including: . . . local and state resident voting for undocumented people, and a ban on any disenfranchisement laws").

²⁷⁴ Kilibarda, *supra* note 149.

II. FROM NOMINAL TO DEEP DEMOCRACY

In this Part, I summarize the comparison between the concepts of democracy put forth by law of democracy scholars and abolitionists, what I respectively term “nominal” and “deep” democracy. I then argue that the nominal democracy contemplated in the law of democracy field is insufficient to build a just and equal system of government perceived as legitimate by the governed. Finally, I discuss the implications of this conclusion for law of democracy scholarship.

A. *Comparing Nominal and Deep Democracy: A Synthesis*

It is difficult to overstate the differences between the democracy of abolitionists and that put forth by the law of democracy. The fields diverge at every stage of analysis: the definition of democracy and citizenship;²⁷⁵ historic understandings of American democracy;²⁷⁶ what each considers problems in American democracy;²⁷⁷ and how the fields recommend change.²⁷⁸ While the law of democracy relies on legal and electoral structures in its approach to defining democracy, as well as political rights in its definition of citizenship, abolition democracy rejects the use of legal and structural abstractions alone in defining either.²⁷⁹ Abolitionists agree with law of democracy scholars’ emphasis on principles of self-rule, including elections, but go further, calling for democracy to guarantee substantive justice and equality.²⁸⁰ Citizenship, abolitionists argue, requires social and economic standing—conditions that enable meaningful participation in the polity, not only political rights.²⁸¹

The law of democracy tells a historical story of an imperfect constitutional democracy later “completed” through the Civil Rights Movement and Voting

²⁷⁵ Compare *supra* subsection I.A.2 (explaining law of democracy scholars’ traditional definition of democracy and citizenship), with *supra* subsection I.B.2 (explaining the various ways that abolitionists define and describe democracy and citizenship).

²⁷⁶ Compare *supra* subsection I.A.3 (explaining law of democracy scholars’ articulation of the history of American democracy), with *supra* subsection I.B.3 (explaining how abolitionists’ histories of democracy are much wider, reaching economic and social conditions in addition to measure of formal democratic standing such as the right to vote).

²⁷⁷ Compare *supra* subsection I.A.4 (explaining the challenges to democracy that law of democracy scholars identify), with *supra* subsection I.B.4 (describing the abolitionist diagnosis of American democracy’s character, based in an appraisal of the on lived, material conditions of marginalized communities and their ability to self govern).

²⁷⁸ Compare *supra* subsection I.A.4 (describing electoral reform efforts), with *supra* subsection I.B.5 (describing the multivariate approaches abolitionists take to enacting deeper democracy now, including but reaching far beyond electoral participation and reform).

²⁷⁹ Compare *supra* subsection I.A.2 (explaining law of democracy scholars’ traditional definition of democracy and citizenship), with *supra* subsection I.B.2 (explaining the various ways that abolitionists define and describe democracy and citizenship).

²⁸⁰ See *supra* note 134 and accompanying text (describing “abolition democracy” as requiring more than access to political rights).

²⁸¹ *Id.*

Rights Act,²⁸² with modern, structural and legal challenges that threaten the system with crisis.²⁸³ In contrast, abolitionists center slavery, racial capitalism, and incarceration in the history American democracy, tracing the ways that the state violence has defined the American system from the founding to the present.²⁸⁴ The law of democracy sees electoral problems such as voter suppression, polarization, and weak campaign finance regulation as primary threats to the current American democratic government, whereas abolitionists diagnose problems with American democracy not as “threats” but indicators of that democracy’s fundamental character.²⁸⁵ In that regard, abolitionists argue that punitive systems, unchecked racial capitalism, and racial hierarchies of privilege and power condemn the current system and must be abolished.²⁸⁶ Where the law of democracy strives for a better version of our current democracy, abolitionists hold that we need not an *improved*, but a *different* democracy—an abolitionist democracy.

The fields also diverge in their theories of change. In the law of democracy, because problems are primarily legal—for example, restrictions on the right to vote or the structure of primary elections—solutions are also legal.²⁸⁷ Thus, litigation and changes in the structure of elections are the primary mechanisms used to respond to threats and remedy flaws in democratic systems.²⁸⁸ By contrast, while abolitionists maintain critiques of laws and sometimes do employ strategies aimed at legislative change, abolitionists are suspicious of law as a means of change and prioritize instead movement and power building, awareness raising, and protest particularly at the local levels.²⁸⁹

Of course, the fields do agree on two ideas: First, American democracy isn’t working.²⁹⁰ Second, voting rights and elections matter. Although there are

²⁸² Pildes, *supra* note 83, at 290 (describing the impact of the Voting Rights Act on the political development of the South, resulting in the “purification’ or ‘maturation’” of the American political system).

²⁸³ For a fuller discussion of democracy law scholars’ perspectives on American history, see *supra* subsection I.A.3.

²⁸⁴ For a fuller discussion of the abolitionists’ critical re-framing of American history, see *supra* subsection I.B.3.

²⁸⁵ Compare *supra* subsection I.A.4 (discussing various challenges to the maintenance of democratic norms), with *supra* subsection I.B.2 (summarizing abolitionists’ rejection of the unqualified term “democracy” to characterize the current system of American governance and pointing instead to the way that material conditions, economic systems, and racial subordination have shaped American “democracy” since the founding).

²⁸⁶ See *supra* subsection I.B.4 (explaining the abolitionist critique of “penal democracy”).

²⁸⁷ See *supra* subsection I.A.4 (documenting examples of litigation strategies put forth by law of democracy scholars to address issue they perceive to threaten democracy).

²⁸⁸ *Id.*

²⁸⁹ See Akbar, *supra* note 22 at 409 (“[I]t would be wrong to think the movement has given up on law.”); *supra* subsection I.B.4 (explaining local efforts led by abolitionists to build deeper democratic communities, both by mobilizing voters and by reallocating resources and power).

²⁹⁰ Compare *supra* note 103 (describing a “democratic recession”), with *supra* subsection I.B.1 (providing examples of abolitionist concerns with American democracy, including its connection to

exceptions, most abolitionist organizers engage with elections and see the right to vote as one important component of citizenship.²⁹¹ The difference between the fields in this regard is the centrality of the right to vote and electoral systems to democracy, writ large. For some scholars in the law of democracy, the expansion of the right to vote in the 1960s “completed”²⁹² American democracy; in righting this long-festering wrong, the ideals and values of the American constitutional system were fulfilled. Understandably, then, efforts to restrict or dilute the potency of the right to vote are seen as the principal threat to the integrity of American democracy today. Abolitionists do not share in this view or discourse. According to an abolitionist reading, the right to vote has never and cannot ever alone define or “complete” democracy.²⁹³ More is needed for full citizenship and much more is needed to bring about an abolitionist democracy than a sturdy right to vote.

In sum, the law of democracy puts forth an idea of democracy that is defined by law and structure and cannot speak to the numerous substantive issues that a democratic system even with regular and competitive elections creates. This, in Mariame Kaba’s words, is a “so-called” or *nominal* democracy.²⁹⁴ By contrast, abolitionists are advancing a view of democracy that looks beyond legal structures and electoral rules—a view that contemplates material conditions of life for marginalized people, equality of employment, social services, and government representation and responsiveness.²⁹⁵ This view of democracy asks not simply what governing structure exists, but who and how it serves. Abolitionists refuse to accept a system without critically judging its performance for the most marginalized people and those people’s relative power to self-govern. This is a *deep* democracy.²⁹⁶

inequality, racial hierarchy, and violence) and Section I.C (explaining some contemporary abolitionists’ frustration with electoral politics).

²⁹¹ See *supra* notes 251–53 (explaining how abolitionists and Black Lives Matter advocates engage in electoral politics).

²⁹² Pildes, *supra* note 83, at 290; *supra* note 282 and accompanying text.

²⁹³ See *supra* notes 164–69 (describing the expanded definition of citizenship beyond enfranchisement that abolitionist and Black radical scholars embrace) and notes 175–80 (outlining how abolitionist histories of U.S. democracy do not turn on or exclusively center the right to vote). view that the right to vote alone cannot secure a deep or abolitionist democracy).

²⁹⁴ Kaba & Duda, *supra* note 17.

²⁹⁵ See Roberts, *supra* note 20, at 43 (explaining the need for radical democracy, which demands consideration and transformation of social, economic, and political conditions).

²⁹⁶ In adopting this term, I build on the analyses of several law and political philosophy professors. Professor Cornel West has called for an expansion of the “deep democratic tradition” in the United States. WEST, *supra* note 33, at 68, 86 (“This book is, in part, an extension of the Emersonian [democratic] tradition.”). Professor Judith Green has also articulated the need for a “philosophy of deep democracy that can guide individual and social transformation.” JUDITH M. GREEN, DEEP DEMOCRACY: COMMUNITY, DIVERSITY, AND TRANSFORMATION ix (1999). Acknowledging the links between the “deep ecology” movement and the call for “deep democracy,” Professor Green explains:

Table 1: Deep Versus Nominal Democracy²⁹⁷

	Nominal Democracy (Law of Democracy)	Deep Democracy (Abolitionists)
Definition of Democracy	Majoritarian rule through regular, competitive elections without loss of civil liberties and the co-option of one political group.	Substantive justice, equality, community self-determination and control.
Definition of Citizenship	The ability to participate in politics, safeguarded through the right to vote.	The ability to meaningfully self-govern, requiring economic solvency, civic recognition and identity, and legal standing (including the right to vote).
History of American Democracy	An “imperfect” but evolving Constitutional democracy, where what is needed is a <i>more perfect</i> democracy.	A “slave democracy” turned “carceral democracy,” where what is needed is a <i>different</i> democracy.
Today’s Challenges	Primary threats to be addressed include: political polarization, voter suppression and felon disenfranchisement, and campaign finance.	Defining features of contemporary American democracy to be eradicated include: punishment systems (police and prison systems), racial capitalism, and racial hierarchy.

Many environmental philosophers have argued that we need a *deep ecology* to articulate the meaning and imperative of effective caring for the shared, fragile ecosystem in which we humans find our natural home. Likewise, we need a clear, contemporary articulation of *deep democracy* to interpret the origins and the imperative, historically unfolding transformative implications of the democratic ideal.

Id.; see also Bill Devall, *The Deep Ecology Movement*, 20 NAT. RES. J. 299, 299 (1980) (explaining “deep ecology” as a “revolutionary” stream of environmentalism, one that repudiates mere reforms and seeks to develop a new “environmental ethics of person/planet”). Political philosopher Iris Marion Young has also called for “deep democracy,” which would widen the goals of democratic politics beyond the “minimalist understanding of democracy” and “the superficial trappings that many societies endorse and take some steps to enact.” IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 5 (2002); see also Patricia A. Wilson, *Deep Democracy: Creating a Culture of Dialogue*, 19 LBJ J. PUB. AFFS. 33, 33 (2008) (defining deep democracy as “an organizing principle based on the transformation of separation to interconnectedness in the civic arena”).

²⁹⁷ For a discussion of the explanations and definitions provided in this table, see *supra* Part I.

Theory of Change	Law- and rights-based litigation and legislation.	Movement building, resistance, awareness raising, community sharing and support, civic recognition, and electoral reform.
Metric for Progress	Regular, competitive elections and the respect for democratic norms and rules.	The lived experiences of people, particularly those at the margins.

B. *Victory without a Battle: The Insufficiency of Nominal Democracy*

The vision of democracy a field adopts, either explicitly or implicitly, shapes its actions and values. The differences between nominal and deep democracy are neither insignificant nor without cost. In this Section, I argue that nominal democracy constrains democratic attention to electoral concerns at the expense of crises less related to voting, labels the United States a democracy or worse—a “mature”²⁹⁸ democracy—without attention to the conditions it creates, marginalizes democratic work and thought that operates outside of the electoral realm, and fails to respond to the incisive critiques of those who are disillusioned with the current political system of the United States. The collective effect of these impacts creates a roadblock to imagining and enacting a deeper, more just democracy.

As Professor Kimberlé Crenshaw notes in her argument for “capacious” frames of scholarship and analysis, “if you don’t have a [big enough] frame, facts fall out of the frame.”²⁹⁹ Alec Karakatsanis, a criminal defense lawyer, criticizes modern prison reform efforts as “quell[ing] popular energy for dramatically changing the punishment system,” and “burn[ing] the areas around the growing fire, ensuring that the fire for reform never threatens the most important punishment infrastructure.”³⁰⁰ With its narrow focus but haughty rhetoric, nominal democracy adopts a tiny frame within the much larger picture of American democracy, pushing white supremacy and state-

²⁹⁸ Pildes, *supra* note 40, at 37.

²⁹⁹ Speaking in October of 2020, Professor Kimberlé Crenshaw said:

We don’t have frames that are capacious enough to include the ways that Black women are vulnerable to police violence. . . . If you don’t have a frame, then facts fall out of the frame If facts don’t fit the frame, then people forget the facts. They can’t hold them. . . . So when Black women . . . fall out of the frame, they fall out of the movement.

Professor Kimberlé Crenshaw, Speech at the University of Pennsylvania Law School Public Interest Week, at 30:25 (Oct. 23, 2020), <https://upenn.app.box.com/s/uhxd01yvbao5bj8ra9tzs98d4ttc2bee>.

³⁰⁰ KARAKATSANIS, *supra* note 120, at 83.

sanctioned violence out of view. Moreover, like police and prison reform efforts, tinkering only within the electoral frame to change American democracy might similarly draw popular energy towards electoral issues and away from other social and economic problems just as significant for citizenship and democracy. More consequentially, nominal democracy obfuscates the role of such problems in shaping American democracy at all, divorcing social and economic challenges, where they do not impact electoral participation or results, from appraisals of democracy altogether. Nominal democracy leads us to ask what we can change about elections and inhibits our ability to ask what we might change about the experience of being governed.

Additionally, nominal democracy's willingness to label systems that hold regular and fair elections, conform to majority rule, and provide the right to vote as democracies—regardless of the conditions they create—legitimizes state systems that perpetuate inequality, racial hierarchy, and violence. Were voter suppression to vanish tomorrow, American democracy would remain carceral so long as economic inequality divides the wellbeing and opportunities between racialized communities and so long as police and prison systems manage that inequality through surveillance and caging. Perhaps a system with perfect elections would be “complete” legally and structurally, but the polity would retain a political and economic system inseparable from racial subordination. Labeling such a system democracy, as Joy James reminds, is to declare “victory without having waged a battle against captivity.”³⁰¹

Nominal democracy also offers no response to the disillusionment and alienation of people living in the United States. As the abolitionist critique elucidates, many of the most substantive issues that affect people's lives—wealth inequality, lack of access to vital services like health care or affordable housing, structural racism, and police and carceral violence—cannot be solved with the vote and fair electoral rules alone.³⁰² A much larger political shift is required to bring about a different relationship between the government and the governed.

³⁰¹ Joy James, *Abolitionists Democracy: Fear, Loathing, and Violence in the 2016 Campaign*, ABOLITION J. (Oct. 24, 2016), <https://abolitionjournal.org/abolitionist-democracy-dispelling-fear-loathing-2016-campaign> [<https://perma.cc/MD9B-8B9L>]. Professor Eddie Glaude similarly cautions:

Baldwin understood that America's greatness rests with its willingness . . . to finally embrace who and what it is. Unlike Whitman, for Baldwin that embrace required a reckoning with the dark history of this country . . . *Until and unless this happens, ours will be an ongoing disaster disguised as the triumph of democracy achieved.*

Eddie S. Glaude 2020 Judge Higginbotham Lecture, at 43:32, <https://www.youtube.com/watch?v=LVSfNTr-tqQ> [<https://perma.cc/3EJC-CX5Y>] (emphasis added).

³⁰² See *supra* Section I.C (explaining the abolitionist frustration with theories of change that center electoral reform without addressing or engaging a deeper systemic analysis); subsection I.B.4 (same).

Finally, perhaps its greatest harm, nominal democracy marginalizes organizing and scholarship that does not focus primarily on voting rights and elections but does have great bearing on democracy. The collective erasure of abolitionist contributions to U.S. democracy has a heavy weight.³⁰³ If adopting an expanded view of citizenship, one that requires the recognition of the role of a group in the history of the United States to achieve full enfranchisement, the erasure of abolitionists, especially Black abolitionists, as source of authority on American democracy now and throughout history is itself disenfranchising. Moreover, the failure to recognize the democratic weight of abolitionist organizing and thought means that when lawyers turn to questions of democracy, they do so without the wisdom and practice of some of the country's foremost democratic activists: abolitionists.

These issues with nominal democracy are not just problematic, but dangerous. Every day in the current American democracy police, prisons, and poverty brutalize and kill Black, Indigenous, and other people of color. The inability to imagine and enact a different, better system privileges the status quo, making the current system harder to change. And until change comes, more people will be deprived of basic liberties and die at the hands of the state. Legal concepts of democracy can be an obstacle or an asset in looking clear-eyed at American democracy and following the long abolitionist call to create something better. Abolitionist thought offers a challenge to legal scholars and lawyers to deepen our expectations of democracy and widen our scope of analysis and work, and the challenge is urgent.

C. *Doctrinal Implications for the Law of Democracy and Public Law*

The abolitionist, deep view of democracy has several implications for law of democracy scholarship. First, to escape the trap of “nominal” democracy, the law of democracy should expand its lens beyond elections. While the field's sometimes narrow focus on structures and institutions has wrought enormous debate, its singular focus on electoral politics has gone largely unscathed.³⁰⁴

³⁰³ See generally Nicole Hannah-Jones, 1619, N.Y. TIMES MAG. (Aug. 18, 2019), <https://nyti.ms/2H4KijC> [<https://perma.cc/LSK6-9VER>] (“The truth is that as much democracy as this nation has today, it has been borne on the backs of black resistance. . . . [B]lack Americans have made astounding progress, not only for ourselves but also for all Americans.”). The New York Times Magazine's 1619 Project “aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.” *Id.*

³⁰⁴ One identifiable critique, however, is the argument that the law of democracy field must recognize the importance of constituent services. See Joshua Bone, Comment, *Stop Ignoring Pork and Potholes: Election Law and Constituent Services*, 123 YALE L.J. 1406, 1422 (2014) (“Even though structuralist arguments depend on designing political incentives to increase the likelihood that

Professor Tabatha Abu El-Haj has offered the clearest critique of the field's electoral lens as overly narrow and constrained.³⁰⁵ Professor Abu El-Haj surveys participation in democratic politics in the nineteenth and twentieth centuries and the multivariate means people used to influence policymaking, including petitioning, street politics and protest, and referenda.³⁰⁶ Like many abolitionist organizing techniques, these activities did not require participants to be wealthy, to be a citizen, or to have the right to vote.³⁰⁷ Ultimately, Professor Abu El-Haj suggests that the law of democracy has been too limited in its analysis, arguing: "We must work the more participatory political practices—from community organizing, whether traditional or internet based, to public interest litigation on both the left and right—into our analyses and our considerations of the law of democracy."³⁰⁸

Emerging public law scholarship similarly supports recognition of means of democratic participation beyond the ballot. Professor Maggie Blackhawk, for example, has recently expanded on Professor Abu El-Haj's analysis and highlighted the historical role of petitioning in allowing individual and minority group participation in the lawmaking process.³⁰⁹ Professor Daryl Levinson's landmark article *Rights and Votes*, presenting a linked vision of rights and influence, adopts an expanded definition of "voting" to encompass "not just ballots but also any form of representation or direct participation in processes of collective decisionmaking."³¹⁰

The abolitionist call for deep democracy supports both Professor Abu El-Haj's critique and that of public law scholars: the law of democracy should catch up. If it were to do so, it could offer much richer, more comprehensive analysis and avoid some of the many pitfalls of nominal democracy.³¹¹ It could also expand its corresponding theory of change—through acknowledging that challenges to democracy occur outside electoral realms, more direct means of participation, such as through community budgeting processes, become visible.³¹²

constituents receive optimal representation, no one engaging in the debate over policing partisan lockups has seriously considered constituent service tradeoffs.").

³⁰⁵ Abu El-Haj, *supra* note 16, at 4-5.

³⁰⁶ *Id.* at 28-44.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 67-68.

³⁰⁹ Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142 (2016) ("[A] contextualized understanding of petitioning, and the republican values it preserved, could move the debate around lobbying reform . . . toward an affirmative vision of how Congress ought to engage with the public during the lawmaking process.").

³¹⁰ Levinson, *supra* note 80, at 1291. Notably, Levinson also includes an expanded definition of rights, including positive rights such as different forms of welfare and direct state support. *Id.*

³¹¹ See *supra* Section II.A (discussing how nominal democracy fails to account for substantive inequalities and fails to incorporate abolitionist wisdom).

³¹² See Editorial Board, Opinion, *Righting 150 Years of Wrong in Florida*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/opinion/florida-voting-felons.html> [<https://perma.cc/Y5Q8-EJP6>]

Second, abolitionist views of democracy bridge emerging theories in public law with structural analyses more at home in the law of democracy, suggesting the boundary between constitutional law and law of democracy should remain porous and open. For example, in a technical departure from the law of democracy, Professor Gerken has outlined the way federalism could offer opportunities for minority power and rule.³¹³ Progressive federalism is a prime example of doctrinal boundary crossing and an idea that squares beautifully with abolitionist views of highly local self-governance. Abolitionist analysis might also provide a bridge between constitutional law frameworks and the law of democracy regarding concepts of citizenship. In particular, Professor Reva Siegel has argued that the full citizenship guarantee of the Nineteenth Amendment entails, for women, constitutional protections from domestic violence and other forms of family gender domination.³¹⁴ This expansive reading is highly relevant to a potentially expanded, thicker understanding of citizenship and democracy—and such expansive interpretations may carry over well to the Reconstruction Amendments, as well.

A final example of the nexus abolitionist views may create between the law of democracy and constitutional law is the increased constitutional focus on abolition. Professor Dorothy Roberts's recent Supreme Court Foreword has charted new territory in constitutional law by exploring abolitionist approaches to the U.S. Constitution and the Supreme Court's "anti-abolitionist jurisprudence."³¹⁵ As the law of democracy hopefully expands its lens to consider movements like abolition and its democratic contributions, such expansion should necessarily entail attention to Professor Roberts's recent scholarship on abolition and the U.S. Constitution. By doing so, law of

(describing the work of activists leading to the restoration of voting rights to 1.4 million people via a ballot initiative vote in November 2018). Professor Michael J. Klarman's 2019 Supreme Court Foreword, which acknowledged economic inequality as a threat to democracy, marked a positive advance in this direction. Klarman, *supra* note 15, at 148 ("[C]onditions of economic inequality also contributed significantly to [Trump's] victory, and, in turn, to the degradation of American democracy."). However, as Professor Akbar argues in her response, Professor Klarman still relies on electoral reform to remedy the problem. Akbar, *supra* note 25, at 95-96.

³¹³ E.g., Heather Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. (2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism> [<https://perma.cc/XE5X-FW8Y>] (arguing that state and local governments have become "sites of empowerment" for minorities and dissenters); Heather Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, 44 DEMOCRACY J., <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide> [<https://perma.cc/RK64-V56T>] (calling federalism "one of the most powerful weapons in politics" and encouraging progressives to use cities and states to challenge national policies and values).

³¹⁴ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949, 992 (2002) (proposing a "synthetic reading of the Fourteenth and Nineteenth Amendments that is grounded in the history of the woman suffrage campaign," which "denounced the law's failure to protect women from physical coercion in marriage, including domestic violence").

³¹⁵ Roberts, *supra* note 20, at 92.

democracy approaches to Fourteenth Amendment and other constitutional claims can borrow from Professor Roberts's frameworks, so as to not unintendedly re-entrench anti-abolitionist doctrine.³¹⁶

III. IMPLICATIONS FOR PRACTICE: HOW DEMOCRACY LAWYERS CAN HELP BUILD AN ABOLITION DEMOCRACY

In the final Part of this Comment, I propose ways that abolitionist analysis can inform the choices and work of practicing lawyers. From making new or different constitutional arguments to working to strengthen and support movements, lawyers have a valuable role to play in advocating for deeper democracy. This Part first explores how lawyers working in voting rights and election law can adjust their advocacy in light of abolitionist analysis and next addresses how democracy-minded lawyers can look beyond voting and elections to support democratic transformation. These suggestions are only an initial attempt to translate the many implications of the abolitionist challenge to traditional legal frames of democracy into action. Many more opportunities for change and collaboration remain to be explored.

A. *Rooting out Slave Power: Steps to Radical Election Lawyering*

Electoral reform and ensuring the right to vote are important to building and sustaining a deep democracy. However, both the scope of the reform and how reform work is discussed matter. Lawyers working to ensure fair elections and strong popular suffrage can help build deep democracy by telling a more comprehensive story of American democracy, engaging critically with the U.S. Constitution, and seeking more radical electoral reforms.

1. Tell a Better Story

For lawyers working to challenge injustices in electoral systems, one of the most urgent changes to make is a shift in language—particularly, in the way they discuss democracy in oral arguments and briefs. Language is important to law: “It is through language that social problems are translated into legal issues.”³¹⁷ The importance of language is tripled where it intersects

³¹⁶ *Id.* at 76 (“Three of the Court’s key anti-abolition doctrines are especially relevant to upholding the carceral punishment system: colorblindness, the discriminatory purpose requirement, and fear of too much justice.”). For a greater discussion of how democracy lawyers can draw from Professor Roberts’s analysis, see *infra* subsection III.A.2. Additionally, abolitionist views of democracy suggest that in the great structure-rights divide within the law of democracy, a hybrid approach may most effective. See, e.g., Charles, *supra* note 44, at 1102. However, the full exploration of the role of rights within both democratic models is outside the reach of this Comment.

³¹⁷ SALLY MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER* 12 (2007).

with and becomes law. When lawyers litigate cases about voter suppression, gerrymandering, or other electoral issues, the way they describe American democracy and its history takes on greater weight. It is in these historical readings that the divergence between nominal and deep democracy becomes apparent. Perhaps no case demonstrates the importance of history telling better than *Shelby County v. Holder*, in which Chief Justice John Roberts, while explaining the Court's reasoning in eliminating the pre-clearance requirement from the Voting Rights Amendment, famously observed that, "history did not end in 1965."³¹⁸ "Regardless of how to look at the record" of congressional fact finding, he wrote, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that . . . clearly distinguished the covered jurisdictions from the rest of the Nation" at the time the Voting Rights Act was enacted.³¹⁹ Justice Ruth Bader Ginsburg in dissent refuted the claim that improvements in the South have rendered the Voting Rights Act an unlawful anachronism and reminded that racism in the Alabama state house remains entrenched.³²⁰ She conceded, however, overall amelioration to race relations in the South.³²¹ Notably, the Court looked to national changes in political representation to make this assessment, as Chief Justice Roberts noted that, "minority candidates hold office at unprecedented levels."³²²

The underlying conflict in *Shelby County* is about the creative efforts of states to prevent minorities, particularly Black communities, from voting, as well as Congress's power under the Fifteenth Amendment to stop those practices before they become law.³²³ Both the majority and dissent discuss recent history more broadly than just access to the polls, making assessments about the overall trajectory of the country and specifically the South since the Civil Rights Movement.³²⁴ However, neither opinion provides a complete history; both fail to mention the incarceration that developed as a backlash to the Voting Rights Act and Civil Rights Movement,³²⁵ the impact of incarceration on the lived experiences of people of color, or its anti-democratic effects.

³¹⁸ 570 U.S. 529, 552 (2013).

³¹⁹ *Id.* at 554.

³²⁰ *See id.* at 563-65 (Ginsburg, J., dissenting) ("Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.").

³²¹ *See id.* at 575 ("True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it.").

³²² *Id.* at 540, 547 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

³²³ *Id.* at 535-36.

³²⁴ *Id.* at 547.

³²⁵ *See, e.g.,* James, *supra* note 19, at xxxiv (describing a national shift focused on crime and police in response to the more radical threads of the Civil Rights Movement); Roberts, *supra* note

Perhaps this oversight can be partially attributed to the lawyers who argued the case and submitted amicus briefs, who did not emphasize the intersecting histories of enslavement, incarceration, and voting rights. While the National Lawyers Guild urged in its brief that the Court not forget the United States' history of slavery and colonization and consider that history's "present effects," the brief does not mention modern incarceration or explain how history has continued to shape the country *after* the Fifteenth Amendment was ratified or the Voting Rights Act was passed.³²⁶ Neither the National Lawyers Guild nor the Brennan Center nor the government briefs mention how punishment systems operate within the history of racial discrimination and American democracy since the Civil Rights Movement.³²⁷ Arguments embracing a more comprehensive view of discrimination and acknowledging a compromised democracy in the South likely would not have changed the Court's decision and the lawyers may have omitted more broad tellings of history for sound strategic reasons. Still, such arguments would have mitigated the erasure of police and prison violence from the history of American democracy and challenged the notion that disenfranchisement only happens at the polls.

Fortunately, since *Shelby County*, Justice Sonia Sotomayor has offered a hopeful example of how to discuss democracy in deeper terms. In a dissenting opinion in *Utah v. Strieff*, a case in which the Court held that evidence recovered during what originated as an unconstitutional traffic stop was admissible because the police discovered an outstanding arrest warrant during the stop, Justice Sotomayor discussed the implications of racially motivated police stops and searches for democracy. She argued that the Court's decision would say to people of color, specifically, "that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."³²⁸ Concluding her impassioned dissent, Justice Sotomayor echoed

20, at 71 ("Every advance toward black liberation since the Civil War ended has been met with formidable political and judicial backlash.") (citing CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 4-6 (2016)).

³²⁶ The National Lawyers Guild had argued that:

The United States has a shameful history of discrimination against, and oppression of, African-Americans, Native peoples, and other persons of color dating back centuries prior to the adoption of the Constitution. . . . This sordid history need not be recounted at length, but it should not be forgotten and this Court must consider its present effects.

Nat'l Laws. Guild, Brief of Amicus Curiae National Lawyers Guild in Support of Respondents at 5-6, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 432968.

³²⁷ *Id.*; Brief of the Brennan Center for Justice at NYU School of Law as Amicus Curiae in Support of Respondents, *Shelby County, AL v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 417738.

³²⁸ 136 S. Ct. 2056, 2070-71 (2016) (J. Sotomayor, dissenting).

Mariame Kaba's insistence³²⁹ that the treatment of any group in a democracy affects everyone else: "We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."³³⁰ Professor Roberts observes, "Justice Sotomayor's understanding that the carceral state subjects people to a form of racialized control that denies their freedom and democratic citizenship—and therefore must be curtailed—reflects the values of antislavery abolitionists . . ."³³¹

Justice Sotomayor's invocation of democracy in *Strieff*, a criminal case, reflects the abolitionist call to recognize how systems of punishment and criminalization are bound up in people's experience of democracy and citizenship.³³² Democracy lawyers must similarly convey the contours of deep democracy, including the anti-democratic nature of punishment systems, in cases involving elections and voting. Sometimes, the connection between punishment and participation in electoral politics is even closer than in *Strieff*. For example, in 2018, in one of the most shocking examples of criminalization used to chill and inhibit voting, Crystal Mason was arrested in Texas for voting while ineligible and sentenced to five years for her mistake.³³³ The trend of using criminal law and the threat of incarceration to suppress the vote continues to grow.³³⁴ In litigating these and other voting rights cases, democracy lawyers

³²⁹ Kaba explains: "[Prison Industrial Complex] abolition has something to teach us about democracy. It allows us to say and mean that if one of us is caged, then all of us are. That no one is free if some of us aren't. Folks need to focus on this to achieve actual democracy." Kaba & Duda, *supra* note 17.

³³⁰ *Strieff*, 136 S. Ct. at 2071 (Sotomayor, J. dissenting).

³³¹ Roberts, *supra* note 20, at 84-85.

³³² For a discussion of how abolitionists integrate histories of discrimination and incarceration into their understanding of what democracy is and is not, see *supra* subsection I.B.2.

³³³ Meagan Flynn, *Texas Woman Sentenced to 5 Years in Prison for Voting While on Probation*, WASH. POST (Mar. 30, 2018, 6:01 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/30/texas-woman-sentenced-to-5-years-in-prison-for-voting-while-on-probation> [<https://perma.cc/Y59Y-2X4B>]. For other examples of the relationship between violence and democracy, see KARAKATSANIS, *supra* note 120, at 51.

³³⁴ P.R. Lockhart, *GOP-Led States Move the War on Voting to a New Front: Voter Registration*, VOX (April 26, 2019, 5:00 PM), <https://www.vox.com/policy-and-politics/2019/4/26/18516722/voting-restrictions-registration-tennessee-texas-penalties-fines> [<https://perma.cc/8AL9-EJFR>] (describing additional cases after Crystal Mason's in which individuals were prosecuted for voting errors and state efforts to further criminalize those and other violations of electoral law for individuals and advocacy groups). Stacey Abrams' organization, Fair Fight Action, in Georgia created a new project in 2020 to fight the increased criminalization of "lawful voting" and "innocent mistake[s], including individuals registering people to vote, someone helping other voters obtain absentee ballots, and organizing rides to the polls." *Fair Fight Action Anti-Voter Suppression: Legal Defense (Criminal/Tax/Immigration)*, FAIR FIGHT ACTION (Oct. 9, 2020), <https://wetheaction.org/projects/863-fair-fight-action-anti-voter-suppression-legal-defense-criminal-tax-immigration> [<https://perma.cc/ZMS9-PU6H>]. This increased criminalization even includes provisions that enable criminal penalties against civil society organizations. CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 152 (2018). Notably, an abolitionist approach to these issues would

must follow Justice Sotomayor's example in linking democracy and punishment systems, reading citizenship broadly, and emphasizing the way racial subordination condemns the character of American democracy.

2. Engage More Critically with the U.S. Constitution

Key elements of the abolitionist view of democracy, including a commitment to substantive justice, racial equality, and a robust conception of citizenship, do not arise from a traditional reading of the U.S. Constitution.³³⁵ In fact, some abolitionists would describe these key tenets as in tension with the values set out in the Constitution.³³⁶ As such, abolitionist groups have often turned to international human rights frameworks rather than invoke the U.S. Constitution.³³⁷ Moreover, even law of democracy scholars have noted the increasingly restricted space within constitutional law to uphold basic voting rights protections, much less to find constitutional grounds for racial equality and power building in or outside electoral systems.³³⁸

How then should a democracy-minded lawyer committed to deep democracy approach the U.S. Constitution? In spite of its complex history, lawyers need not disregard the document. Borrowing from Professor Roberts's abolitionist

also eschew the use of punishment systems in the reverse: rejecting the call some have made to provide criminal penalties for those who attempt to obstruct the vote. *Cf.* DECEPTIVE ELECTION PRACTICES AND VOTER INTIMIDATION, LAWS' COMM. FOR C.R. (2012), <https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf> [<https://perma.cc/FS5Q-Y5LD>] (calling for the enactment of "[c]riminal and civil penalties to deter, prevent, and penalize election practices").

³³⁵ See Roberts, *supra* note 20, at 109 ("The Constitution is not the standard of justice we should faithfully uphold; equal citizenship is. We know what democracy means not by immersing ourselves in the Constitution's language but by imagining what it would mean for black people to be treated like free and equal human beings.").

³³⁶ Roberts, *supra* note 20, at 55, 58 (describing William Lloyd Garrison and Frederick Douglass's critiques of the U.S. Constitution as fundamentally compromised by the institution of slavery). *But see id.* at 58 ("[M]any black abolitionists grounded their radical approach to citizenship and freedom in the U.S. Constitution itself, a text that had been written and interpreted to enslave them.").

³³⁷ See, e.g., McLeod, *supra* note 22, at 1625 (explaining how the Chicago movement to secure reparations for police torture survivors submitted the case to international bodies); Roberts, *supra* note 20, at 107 ("[A]bolitionists . . . contest U.S. carceral policies without reference to rights or as violations of international human rights. Even claims that rested in part on the U.S. Constitution have primarily relied on international human rights law . . ."). Even the National Lawyers Guild emphasized international human rights and treaty responsibilities in advocating for the Voting Rights Act in *Shelby County*. Nat'l Laws. Guild, Brief of Amicus Curiae National Lawyers Guild in Support of Respondents at 10-14, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 432968.

³³⁸ See Franita Tolson, *Law of Democracy at a Crossroads*, 43 FLA. STATE L. REV. 345, 350-51 (2016) ("These newest restrictions on the right to vote raise fundamental questions about the law of democracy that we must confront if we hope to retain robust electoral participation across race, class, and gender lines . . . Are courts receptive to creative arguments and theories as we confront new challenges to the right to vote?").

constitutionalism, democracy advocates can reclaim the Reconstruction Amendments to find support for deep democracy in the Constitution itself.³³⁹

Under current Supreme Court jurisprudence, two of the Reconstruction Amendments carry forward compromises of the time. The Thirteenth Amendment allows for the reinstatement of slavery or involuntary servitude in the case of criminal conviction.³⁴⁰ This helps to fuel the carceral system and carceral democracy.³⁴¹ The Fourteenth Amendment bears more directly on electoral systems.³⁴² The amendment meant to secure legal citizenship for Black men, but it allows for the revocation of voting rights in the case of criminal conviction.³⁴³ While lawyers can't argue that courts should read those clauses out of the Constitution altogether, Professor Roberts notes that advocates can argue that in light of the overall intent of Congress to end enslaving systems, provisions such as these should be read narrowly or to hold no force.³⁴⁴

Although the Constitution has been considered only recently in the context of prison abolition, Professor Roberts offers a framework that builds off of Reconstruction abolitionist views of the Constitution, which can be used to grapple with the Constitution on abolitionist terms today. This interpretive methodology "embraces the Reconstruction Amendments' constitutional imperatives to end enslaving systems, provide equal protection against state and private violence, and install full citizenship."³⁴⁵ For example, under the abolition constitutionalist lens, the Thirteenth Amendment's punishment clause should be read so as to vindicate the goals of the radical abolitionists who helped its enactment.³⁴⁶ Similar logic could apply to the Fourteenth Amendment's related clause allowing the disenfranchisement of people convicted of crimes, helping give constitutional originalist

³³⁹ See generally Roberts, *supra* note 20 (arguing that the abolitionist reasoning underlying the Reconstruction Amendments can be used to bolster the prison abolition movement).

³⁴⁰ U.S. CONST. amend. XIII, § 1.

³⁴¹ Roberts, *supra* note 20, at 119 (contending that the consequences of criminal conviction, including "[s]ystematic exclusion of former prisoners from labor and housing markets . . . deprives them of full rights of citizenship, amounting to an incident of slavery"); see also James, *supra* note 19, at xxii ("The Thirteenth Amendment ensnares as it emancipates.")

³⁴² U.S. CONST. amend. IV, § 2.

³⁴³ See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (holding that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment" and distinguishing the disenfranchisement of people with felony convictions from other disenfranchisement laws invalidated by the Equal Protection Clause of the Fourteenth Amendment).

³⁴⁴ Roberts, *supra* note 20, at 69 ("[B]oth the abolition constitutionalism that inspired the Thirteenth Amendment and the words and actions of its radical framers suggest we should read the Punishment Clause quite narrowly.")

³⁴⁵ *Id.* at 70-71. In setting out the methodology, Professor Roberts takes seriously the abolitionist critique that the Constitution is invalid, but ultimately concludes that "[t]here are good reasons . . . for prison abolitionists to engage abolition constitutionalism." One of those reasons is the recognition that abolition will happen incrementally and while engaged to some degree with the state. *Id.* at 108.

³⁴⁶ *Id.* at 69.

ammunition to the fight against the disenfranchisement of millions of people unable to vote today because of a prior felony conviction.³⁴⁷

Moreover, using an abolition constitutionalist frame even to address narrow electoral law questions would ensure that where democracy lawyers are advocating through traditional judicial channels, they do so in a way that is consistent with deep democratic aims. Professor Roberts argues that the Supreme Court, since Reconstruction, has created an anti-abolition jurisprudence that has significantly curbed the effectiveness of the Reconstruction Amendments.³⁴⁸ The three anti-abolition doctrines are “colorblindness, the discriminatory purpose requirement, and fear of too much justice.”³⁴⁹ These doctrines, though perhaps more common in criminal cases, extend to voting rights and inhibit efforts to build a deep democracy.³⁵⁰ Democracy-minded lawyers should challenge these doctrines at every opportunity, using intentional language and framing to signal that the doctrines are harmful to criminal law, electoral systems, and the character of the resulting democracy.

3. Seek More Radical Electoral Reforms

In addition to the type of arguments that democracy lawyers can advance with an abolition constitutionalism methodology, lawyers seeking deep democracy might wish to go further to address areas in the electoral systems where the legacies of slavery and colonialism are still strong. Many lawyers are already challenging state voter ID laws, gerrymandering, and other voter suppression measures.³⁵¹ There is ample room to expand these efforts, as

³⁴⁷ See Jordan, *supra* note 81, at 390, 397 (proposing a revival of the Fifteenth Amendment “as an independent source” for reviewing claims of minority vote dilution and gerrymandering and noting that the Fifteenth Amendment “offers a unique vantage point, in which the special protection of the Constitution is extended to racial minorities who seek to participate in this democracy by voting”); CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, SENTENCING PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction> [<https://perma.cc/REK7-EMMG>] (estimating that 5.2 million people are disenfranchised due to a felony conviction).

³⁴⁸ Roberts, *supra* note 20, at 76 (“[T]he Court has failed to account for the systemic forms of racism that persist despite the gains of the civil rights movement.”).

³⁴⁹ *Id.* at 76.

³⁵⁰ *Id.* at 77-78 (describing the impact of colorblindness as a doctrine in the context of voting rights).

³⁵¹ The Brennan Center, for example, is closely tracking the increase number of restrictive voting laws in the states after the 2020 election. *Voting Laws Round Up: January 2021*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021> [<https://perma.cc/UDB5-WCFV>]. For the Center’s previous and ongoing voting rights cases, many of which tackle voter suppression efforts, see *Voting Rights Litigation 2020*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020> [<https://perma.cc/BHN7-YMBY>].

various law of democracy scholars advocate.³⁵² However, abolitionist views of democracy point to even more radical action. In addition to arguing for its narrow construction, democracy lawyers can advocate for the removal of the Punishment Clause of the Thirteenth Amendment and Section Two of the Fourteenth Amendment, allowing for disenfranchisement of people convicted of crimes, from the Constitution.³⁵³ The electoral college is another prime target for abolition. Born out of the three-fifths clause of the original Constitution, which awarded the slave belt more weight in presidential elections, the electoral college continues to distort popular opinion today.³⁵⁴ Given that Donald Trump won the presidency in 2016 with roughly three million fewer votes than Hillary Clinton, he very likely owes his victory to the “slave oligarchy” of the founding.³⁵⁵ In addition, some Native nations are “decolonizing the vote” by encouraging citizens to vote according to ecological and ancestral boundaries rather than proscribed electoral borders, suggesting a plethora of opportunities to rethink and challenge electoral system from an intersectional, anti-colonial perspective.³⁵⁶

Finally, what about those without citizenship or lawful immigration status? In the United States, more than twenty million people live as legal permanent residents or without legal immigration status and are unable to vote—a situation scholar Konstantin Kilibarda calls “electoral apartheid.”³⁵⁷ In spite of

³⁵² See *supra* subsection I.A.4 (discussing reform efforts consistent with the traditional law of democracy theory of change).

³⁵³ See James, *supra* note 19 (detailing the demands of an abolition democracy platform put forth by incarcerated activists that calls for an amendment to clause two of the Thirteenth Amendment).

³⁵⁴ Professor Akhil Amar argues explains the existence of the electoral college:

In my view, it's slavery. In a direct election system, the South would have lost every time because a huge percentage of its population was slaves, and slaves couldn't vote. But an Electoral College allows states to count slaves, albeit at a discount (the three-fifths clause), and that's what gave the South the inside track in presidential elections.

Sean Illing, *The Real Reason We Have an Electoral College: To Protect Slave States*, VOX (Nov. 12, 2016, 9:30 AM), <https://www.vox.com/policy-and-politics/2016/11/12/13598316/donald-trump-electoral-college-slavery-akhil-reed-amar> [<https://perma.cc/66W9-YF6Q>]; see also AKHIL AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 144 (2012) (“Strong constitutional protections of chattel slavery were tightly woven into both the fabric of the document—most enduringly in the three-fifths clause, giving slaveholders extra political clout in both Congress and the electoral college—and the fabric of everyday life in antebellum America.”).

³⁵⁵ DU BOIS, *supra* note 18, at 497; Gregory Krieg, *It's Official: Clinton Swamps Trump In Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://perma.cc/BTG2-NKGN>].

³⁵⁶ Riverland Native Voter Project, FACEBOOK (Nov. 6, 2018), <https://www.facebook.com/RiverlandNativeVoterProject/videos/1962502690722490> [<https://perma.cc/7JS6-TJEU>] (“We encourage Indigenous people to vote based on ecological and ancestral boundaries with the intent of dismantling oppressive borders and decolonizing the vote.”).

³⁵⁷ Kilibarda, *supra* note 149 (estimating that 13.3 million permanent residents and 11.1 million undocumented residents are excluded from voting).

their paying taxes, contributing to communities, and living and working all under the jurisdiction of U.S. policies and laws, these communities are denied the vote.³⁵⁸ There are certainly more areas in the electoral system that merit analysis; lawyers committed to deep democracy should borrow the radical imagination of abolitionists and look at these issues afresh.³⁵⁹

B. *Democracy Lawyering Beyond Elections*

Perhaps the most important lesson from the abolitionist concept of state is that advocacy for deep democracy does not only take place through elections and court battles. Rather, neighborhood groups, incarcerated people, scholars, students, churches, artists, and organizers are building deep democracy now. There are a variety of ways that lawyers can partner with and support these efforts beyond the constraints of national electoral processes.

1. Localize

It is no surprise that some of the abolitionist movement's biggest successes have happened at the city level. Activists operating at local levels can exploit the same federalist protections that have been held up as a shield against rights litigation for decades.³⁶⁰ Moreover, acting locally can have profound impacts. City ordinances can serve to drive a national agenda, influence political elites, show that certain policies—like reparations—are possible, and even police the behavior of surrounding cities or states through the natural spillover effects of local agenda setting.³⁶¹ Democracy lawyers should follow the abolitionists' lead and consider the radical democratic potential of changemaking at the most local levels. Legal support for this work could include drafting and reviewing the text of city ordinance proposals, reviewing and interpreting state legislation, evaluating the likelihood of potential legislation to weaken or grow local self-governance, and helping to demystify the structure of city and local governments and contractors. Where an ordinance is passed or local democratic processes are contested, civil litigation

³⁵⁸ *Id.*

³⁵⁹ See, e.g., Akbar, *supra* note 22, at 405-09 (“The movement is not attempting to operate outside of law, but rather to reimagine its possibilities within a broader attempt to reimagine the state. Law is fundamental to what movement actors are fighting against and for.”).

³⁶⁰ Gerken, *supra* note 313 (noting that although “[s]tates’ rights have been invoked to defend some of the most despicable institutions in American history . . . [s]tate and local governments have become sites of empowerment for racial minorities and dissenters, the groups that progressives believe have the most to fear from decentralization”).

³⁶¹ Gerken & Revesz, *supra* note 313 (describing the “spillover” as a “powerful weapon in the federalist toolkit” because “[w]hen one state regulates, it often affects its neighbors”).

may become appropriate to ensure the ordinance is fully enforced and the democratic and enforcement processes are sound.

2. Support Movements

Many of the suggestions above cohere with the resurgent field of movement lawyering. Betty Hung defines movement lawyering as “supporting and advancing the building and exercise of collective power, led by the most directly impacted,” and notes that “movement lawyering can contribute to systemic institutional and cultural change.”³⁶² Although the practice of lawyers supporting social movements is at least a half century old, there has been a resurgence in interest and scholarship on movement lawyering in the last decade, which may reflect progressive distrust of courts, changes in legal education, the rise and success of recent movements like Black Lives Matter, or our “distinctively pragmatic age.”³⁶³ Movement lawyering “places social movements at the center of legal and political transformation, pushing aside a focus on courts and lawyers that has long dominated scholarly analysis.”³⁶⁴ Using this approach, lawyers can assist movements to develop advocacy strategies, research and distill political and legal contexts in which movements operate, identify advocacy targets, write proposals, facilitate lobbying activities, negotiate with stakeholders, develop communications plans, develop community trainings, and, where helpful, submit complaints or file lawsuits to further the movement’s goals.³⁶⁵ Such support has gone to a variety of diverse movements.³⁶⁶ Lawyers working to build a deep democracy can immerse themselves in the literature and tools of movement lawyering to support abolitionist movements building a deep democracy now.

³⁶² Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love, and Courage*, 23 CLINICAL L. REV. 663, 663 (2017).

³⁶³ Scott Cummings, *Movement Lawyering*, IL. L. REV. 1646, 1652-54 (2017) (“Over the past decade, scholars and practitioners have turned greater attention to the role of lawyers in social movements.”) (emphasis omitted).

³⁶⁴ *Id.* at 1647.

³⁶⁵ Alexi Nunn Freeman & Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 164-65 (2016).

³⁶⁶ For example, Scott Cummings explains that in the recent interest in movement lawyering:

Inspiration has been drawn from diverse quarters: the legal mobilization against repressive antiterrorism policies launched after 9/11; efforts by the labor and immigrant rights movements at the local level to challenge economic exploitation and raise standards in the low-wage economy; the dramatic march to marriage equality by LGBT rights lawyers; the outburst of protest against unfairness ignited by Occupy Wall Street’s reaction to the Great Recession; grassroots activism in response to police violence against communities of color . . . and recently the explosion of grassroots activism and street protest under the banner “Not Our President” . . .

Cummings, *supra* note 363, at 1646-47.

CONCLUSION

Regina, who watched her Jacksonville, Florida neighborhood buzz with door knockers and voter registration drives in 2008 and 2012, had celebrated President Obama's victories. Still, by 2015 she wondered what the point was: "We made history, but I don't see change."³⁶⁷ Thomas, a twenty-eight-year-old resident of New York City, walked into a voting booth in 2016, chose candidates, and got a sticker. He had understood voting to be the "climax of democracy," but it didn't feel like it.³⁶⁸ In so far as Thomas resigned to voting, it was without enthusiasm. Regina didn't plan to vote at all.³⁶⁹ She would join the roughly fifty percent of U.S. voting-eligible people who choose not to cast a ballot in any given election.³⁷⁰

Thomas felt that his experience voting was anti-climactic in part because he was active in tenant organizing.³⁷¹ Describing his work with others towards rezoning or to protest new developments, he explained, "I think people leave with a sense of empowerment. You might have failed this fight, but now you know your neighbor."³⁷² Regina wasn't interested in voting for a president who wouldn't make change in her community again.³⁷³ Fortunately, abolitionist movements show that she, like Thomas, can work towards transformative change in so many ways beyond the vote. She and others can join protests, learn about her city council budget and representatives, support community members in healing and building transformative justice practices, and learn and teach about deep democracy and liberation. Her neighborhood need not only buzz with change-making activity every four years.

Many people confronting prison abolition for the first time misread the movement's aim to be limited to the end of policing and prisons. The movement's answer to that misconception is elegant: it seeks not just the end of prisons, but a vision for different society with a different experience of being governed. Rather than managing conflict through punishment meted out by racialized institutions, an abolition democracy envisions the protection

³⁶⁷ Robert Samuels, *Disillusioned Black Voters Ask: Is Voting Even Worth It?*, WASH. POST (June 9, 2015) https://www.washingtonpost.com/local/disappointment-in-obama-leads-some-blacks-to-ask-is-voting-even-worth-it/2015/06/09/5922363c-052b-11e5-bc72-f3e16bf50bb6_story.html [https://perma.cc/4X68-LYWN].

³⁶⁸ Rachel Bashein, Zak Cheney-Rice, Amelia Schonbek & Emma Whitford, *12 Young People on Why They Probably Won't Vote*, N.Y. MAG. (Oct. 30, 2018), <http://nymag.com/intelligencer/2018/10/12-young-people-on-why-they-probably-wont-vote.html> [https://perma.cc/FXS3-3XNB].

³⁶⁹ Samuels, *supra* note 367.

³⁷⁰ In 2016, 55.7% of the eligible voting age population voted. Drew Silver, *U.S. Trails Most Developed Countries in Voter Turnout*, FACTTANK: PEW RESEARCH CENTER (May 21, 2018), <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries> [https://perma.cc/58GV-565D].

³⁷¹ Bashein et al., *supra* note 368.

³⁷² *Id.*

³⁷³ Samuels, *supra* note 367.

of political processes, but also the promotion of justice, racial equality, and liberty—a society in which everyone could feel the power and solidarity Thomas and his colleagues felt not only while agitating for change, but in their everyday experiences as citizens. In an abolition democracy, Regina may choose not to vote, but her voice is still heard.

Theories of democracy have started with far less compelling a call. The so-called “radicalism” of the American Revolution and democracy at the founding envisioned only that white men, mostly with property, mostly married, and often slave-holding, could participate in their own self-governance, and by extension, rule over the rest.³⁷⁴ Abolitionists offer a concept of state that is at least equally robust and arguably far more loyal to the democratic values that advocates of all backgrounds have sought to associate with the American system. This re-envisioning of democracy should be recognized as such and contemplated in legal discussions. As Astra Taylor writes, “the idea of self-rule is . . . an ideal, a principle that always occupies a distant and retreating horizon, something we must continue to reach toward yet fail to grasp.”³⁷⁵ In this time of profound anxiety about the future of American democracy, perhaps it is time for a more radical vision and for our horizons to include, but also expand far beyond the next election.

³⁷⁴ See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5-8 (1991) (describing the American Revolution as “the most radical and most far-reaching event in American history”).

³⁷⁵ ASTRA TAYLOR, *DEMOCRACY MAY NOT EXIST, BUT WE’LL MISS IT WHEN IT’S GONE* 13 (2019).